142-56

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 106.

NICHOLAS FINN, PLAINTIFF IN ERROR,

vs.

J. SAM. BROWN, RECEIVER OF THE FIRST NATIONAL BANK OF LEADVILLE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED SEPTEMBER 20, 1888.

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1 Pleas in the circuit court of the United States for the district of Colorado, sitting at Denver.

Be it remembered that heretofore and on, to wit, the 11th day of June, A. D. 1886, came J. Sam. Brown, receiver of the First National Bank of Leadville, by E. O. Wolcott, Esq., his attorney, and filed in said court his complaint and sued out of said court a writ of summons against Nicholas Finn.

And the said complaint is in words and figures as follows, to wit:

Complaint.

UNITED STATES OF AMERICA, *District of Colorado*, } *ss:*

In the Circuit Court.

J. SAM. BROWN, Receiver of the First National Bank of Leadville, Plaintiff,
vs.
NICHOLAS FINN, Defendant.

The plaintiff complains of the defendant and alleges—

I. That the amount here in controversy, for which recovery is sought, exceeds, exclusive of costs, the sum of five hundred dollars ($500.00).

That the First National Bank of Leadville is a corporation duly incorporated under and in accordance with the laws of
2 the United States and existing and heretofore doing business as a national bank within the district of Colorado.

That heretofore and on or about the 24th *of* day of January, 1884, the said bank having refused to pay its circulating notes and suspended payment to its depositors, and being in default, and the Comptroller of the Currency of the United States being satisfied as to the fact of such refusal, suspension, and default, he, the honorable Comptroller of the Currency of the United States, pursuant to the statute in such cases made and provided, appointed a receiver of said bank, to wit, one L. C. Ellsworth; that said Ellsworth subsequently resigned as such receiver, and on, to wit, the first day of February, 1884, the said Comptroller of the Currency duly appointed this plaintiff as receiver of the said The First National Bank of Leadville.

That this plaintiff thereupon entered upon his duties as such receiver and took possession of the books, records, and assets of said banking association, so far as the same could be found, and ever since has continued to be and now is the receiver of said bank.

That at the time of the failure and suspension of said bank, at the date first above mentioned, the said bank was and still is utterly insolvent.

II. And the plaintiff alleges that the defendant, Nicholas Finn, on or about the 29th day of October, 1883, became the holder of

fifty (50) shares of the capital stock of the said The First National
Bank of Leadville, of the par value of one hundred dollars ($100.00)
each, and afterwards and on or about the 12th day of December,
1883, said defendant became the holder of other twenty (20)
shares of said capital stock, of said par value of one
3 hundred dollars ($100.00) each.

That on said 29th day of October, 1883, there was duly issued to said defendant a certificate of stock, the same being numbered 63, for said fifty (50) shares of stock, and on said 12th day of December, 1883, there was further issued to said defendant a certain other certificate of stock, the same being numbered 65, for said twenty (20) shares of stock; that ever since said last-named date the said defendant has been, and at the date of the failure and suspension of said association was, and now is a shareholder of said bank to the extent of seventy (70) shares of said capital stock, of the par value of seven thousand dollars ($7,000.00).

III. And the plaintiff alleges that afterwards and on or about the 28th day of September, 1885, the Comptroller of the Currency of the United States, upon an accounting of the condition of the estate of the said The First National Bank of Leadville, did find and determine that, in order to provide the money necessary to pay the debts of said association, it was necessary to enforce to the full extent of one hundred per centum of the par value of the shares of the capital stock of said association the individual liability of the shareholders of said association provided for by section 12 of the act of Congress entitled "An act to provide a national currency," approved June 3rd, 1864, and by section 5151 of the Revised Statutes of the United States, approved June 22nd, 1874.

That thereupon and for that purpose the said the honorable Comptroller of the Currency, on said 28th day of September, 1885, ordered
and made an assessment or requisition upon the shareholders of
said bank and each and every of them equally and ratably to
the amount of one hundred per centum of the par value of
4 the shares of the capital stock held or owned by such share-
holders respectively in said bank at the time of its said failure
and suspension; and the said the Comptroller of the United States
did further then and there order and direct this plaintiff, as such
receiver, to take the necessary proceedings, by suit or otherwise, to
enforce such individual liability of said shareholders.

IV. And the plaintiff alleges that by virtue of said assessment and requisition there became due from the defendant, Nicholas Finn, one hundred per centum of the par value of the shares by him held as aforesaid, to wit, the sum of seven thousand dollars ($7,000.00).

That after the making of said assessment and requisition as aforesaid and on, to wit, the 9th day of October, 1885, this plaintiff, as such receiver, caused to be served on said defendant a copy of the said order of the Comptroller of the Currency of the United States, together with a notice that the amount required to be paid by the said defendant might be so paid, the one-half (½) in fifteen (15) days and the one-half (½) in thirty (30) days from the date of said notice and demanded of said defendant that such payment be made; that said defendant has not paid such assessment or any part thereof, but has wholly failed and refused to pay the same; that there is now due from the said defendant to this plaintiff, as such receiver, the sum of seven thousand dollars ($7,000.00), with interest from the date of said assessment.

Wherefore plaintiff asks judgment against the said defendant for the sum of seven thousand dollars ($7,000.00), with interest from September 28th, 1885, and for costs of suit.

(Signed) EDWARD O. WOLCOTT,
Attorney for Plaintiff.

5 STATE OF COLORADO, }
Lake County, } *ss:*

J. Sam. Brown, being duly sworn, deposes and says that he is the plaintiff in the above-entitled action and is the receiver of the First National Bank of Leadville; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on information and belief, and as to them he believes it to be true.

(Signed) J. SAM. BROWN.

Subscribed and sworn to before me this 10th day of June, A. D. 1886.

(Signed) DAVID S. IRWIN,
[NOTARIAL SEAL.] *Notary Public.*

(Endorsed:) 1966. In U. S. circuit court. J. Sam. Brown, rec'r, etc., *vs.* Nicholas Finn. Complaint. Filed Jun- 11, 1886. (Signed) Edward F. Bishop, clerk. Edw'd O. Wolcott, att'y for pl'ff.

And the said summons is in words and figures as follows, to wit:

Summons.

6 In the Circuit Court of the United States for the District of Colorado.

UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

J. SAM. BROWN, Receiver of the First National Bank of Leadville, Plaintiff,
versus
NICHOLAS FINN, Defendant.
} Complaint. Filed in the Clerk's Office this 11th day of June, A. D. 1886.

The President of the United States of America to Nicholas Finn, Greeting:

You are hereby notified that an action has been brought in said court by J. Sam. Brown, receiver of the First National Bank of Leadville, plaintiff, against you, as defendant, to recover the sum of

$7,000.00 due from you, the said defendant, as a shareholder of the capital stock of the said First National Bank of Leadville, upon an assessment directed to be made by the Comptroller of the Currency, together with interest from September 28th, 1885, and for costs of suit, as more particularly set forth and described in the complaint filed herein and to which reference is here made.

You are hereby required to appear and demur or answer to the
complaint filed in said action in said court within ten days (ex-
clusive of the day of service) after this summons shall be served on
you, if such service shall be made within the county of Arapahoe,
otherwise within forty days from the day of service, and if you fail
so to do the said plaintiff will take judgment against you by
7 default, according to the prayer of the said complaint, and
will apply to the court for the relief demanded therein.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, at the city of Denver, in said district, this 11th day of June, A. D. 1886, and of the Independence of the United States the 110th year.

(Signed) EDWARD F. BISHOP, *Clerk*,
By F. W. TUPPER, *Deputy Clerk*.

[Seal Cir. C't U. S., Dist. of Colo.]

Proof of Service.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

JUNE 11, A. D. 1886.

I hereby certify that I received the within writ on the 11th day of June, A. D. 1886, and that I have personally served the same upon the said defendant, Nicholas Finn, by delivering to Nicholas Finn, personally, a true copy of the within writ at the time and place as follows: As to Nicholas Finn, at Leadville, county of Lake, on the 12th day of June, A. D. 1886.

This writ, therefore, returned executed as the law directs this 14th day of June, A. D. 1886.

(Signed) ZEPH. T. HILL, *Marshal*,
By T. W. BURCHINELL,
Deputy Marshal.

8 (Endorsed:) Gen. No., 1966. Circuit court of the United States for the district of Colorado. J. Sam. Brown, receiver of the First National Bank of Leadville, plaintiff, *versus* Nicholas Finn, defendant. Summons. Filed this 14 day of June, A. D. 1886. (Signed) Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. E. O. Wolcott, attorney for plaintiff.

And afterwards and on, to wit, the 19th day of July, A. D. 1886, came again the said plaintiff, by E. O. Wolcott, Esq., his attorney aforesaid, and filed in said court and in said cause his amended complaint.

And the said amended complaint is in words and figures as follows, to wit:

Amended Complaint.

UNITED STATES OF AMERICA,
State and District of Colorado, } *ss:*

In the Circuit Court of the United States within and for said District.

J. SAM. BROWN, Receiver of the First National Bank of Leadville, Complainant,
vs.
NICHOLAS FINN, Defendant.

Comes now the plaintiff herein, by Edward O. Wolcott, his
9 attorney, and for an amended complaint herein complains of the defendant and alleges—

That the amount here in controversy, for which recovery is sought, exceeds, exclusive of costs, the sum of five hundred dollars ($500).

That the First National Bank of Leadville is a corporation duly incorporated under and in accordance with the laws of the United States and existing and heretofore doing business as a national bank within the district of Colorado.

That heretofore and on or about the 24th day of January, 1884, the said bank having refused to pay its circulating notes and suspended payment to its depositors, and being in default and wholly insolvent, and the Comptroller of the Currency of the United States being satisfied as to the fact of such refusal, suspension, default, and insolvency, he, the honorable Comptroller of the Currency of the United States, pursuant to the statute in such cases made and provided, appointed a receiver of said bank, to wit, one L. C. Ellsworth; that said Ellsworth subsequently resigned as such receiver, and on, to wit, the 1st day of February, 1884, the said Comptroller of the Currency duly appointed the plaintiff as receiver of the said The First National Bank of Leadville; that this plaintiff thereupon entered upon his duties as such receiver and took possession of the books, records, and assets of said banking association, so far as the same could be found, and ever since has continued to be and now is the receiver of said bank.

And, for a first cause of action, the plaintiff alleges—

I.

That the defendant, Nicholas Finn, on or about the 29th day of October, 1883, became the holder of fifty (50) shares of the
10 capital stock of the said The First National Bank of Leadville, of the par value of one hundred dollars ($100) each, and afterwards and on or about the 12th day of December, 1883, said defendant became the holder of other twenty (20) shares of said capital stock, of said par value of one hundred dollars ($100) each.

That on said 29th day of October, 1883, there was duly issued to said defendant a certificate of stock, the same being numbered sixty-three (63), for said fifty (50) shares of stock, and on said 12th day of December, 1883, there was further issued to said defendant a certain other certificate of stock, the same being numbered sixty-five (65), for said twenty (20) shares of stock; that ever since said last-named date the said defendant has been, and at the date of the failure and suspension of said association was, and now is a shareholder of said bank to the extent of seventy (70) shares of said capital stock, of the par value of seven thousand dollars ($7,000).

II.

And the plaintiff alleges that afterwards and on or about the 28th day of September, 1885, the Comptroller of the Currency of the United States, upon an accounting of the condition of the estate of the said The First National Bank of Leadville, did find and determine that, in order to provide the money necessary to pay the debts of said association, it was necessary to enforce to the full extent of one hundred per centum of the par value of the shares of the capital stock of said association the individual liability of the shareholders of said association provided for by section 12 of the act of Congress entitled "An act to provide a national currency," approved June 3rd, 1864, and by section 5151 of the Revised Statutes
11 of the United States, approved June 22nd, 1874.

That thereupon and for that purpose the said the honorable Comptroller of the Currency, on the said 28th day of September, 1885, ordered and made an assessment or requisition upon the shareholders of said bank and each and every of them equally and ratably to the amount of one hundred per centum of the par value of the shares of the capital stock held or owned by such shareholders respectively in said bank at the time of its said failure and suspension, and the said Comptroller of the Currency of the United States did further then and there order and direct this plaintiff, as such receiver, to take the necessary proceedings, by suit or otherwise, to enforce such individual liability of said shareholders.

III.

And the plaintiff alleges that by virtue of said assessments and requisition there became due from the defendant, Nicholas Finn, one hundred per centum of the par value of the shares by him held as aforesaid, to wit, the sum of seven thousand dollars ($7,000).

That after the making of said assessment and requisition as aforesaid, and on, to wit, the 9th day of October, 1885, this plaintiff as such receiver caused to be served on said defendant a copy of the said order of the Comptroller of the Currency of the United States, together with a notice that the amount required to be paid by the said defendant might be so paid, the one-half ($\frac{1}{2}$) in fifteen (15) days and the one-half ($\frac{1}{2}$) in thirty (30) days from the date of said notice, and demanded of said defendant that such payment be made; that said defendant has not paid such assessment or any part thereof,

but has wholly failed and refused to pay the same; that there
12 is now due from the said defendant to this plaintiff as such
receiver the sum of seven thousand dollars ($7,000), with
interest from the date of said assessment.

And for a second cause of action plaintiff complains of the defendant and alleges—

I.

That heretofore, to wit, on the 2nd day of January, 1884, and for a long time prior thereto, the defendant, Nicholas Finn, was a shareholder and director and was acting cashier of said The First National Bank of Leadville; that on said date and for a long time prior thereto the said The First National Bank of Leadville was utterly insolvent.

II.

That on said 2nd day of January, 1884, the said The First National Bank of Leadville by its board of directors fraudulently and wrongfully declared and caused to be declared a dividend of twenty-five per cent. (25%) upon its capital stock to be paid to the shareholders of said stock; that the defendant as such director of said bank was present at the meeting of said board of directors at which said dividend was so declared and united in said action with full knowledge of said insolvency as aforesaid.

III.

And plaintiff further alleges that thereupon and on or about said 2nd day of January, 1884, the said The First National Bank of Leadville paid to its several shareholders the amount of said dividend, and the defendant herein, being the holder of seventy (70) shares of the par value of seven thousand dollars ($7,000) of the capital stock of said bank, did then and there as such shareholder
receive the full sum of seventeen hundred and fifty dollars
13 ($1,750) as his proportion of said dividend of twenty-five per
cent. (25%) so declared as aforesaid.

IV.

The plaintiff further avers that at the time the said bank by its board of directors so declared and paid the said dividend there were no net profits of said banking association whatsoever; that the whole of the dividend so declared and paid was wrongfully withdrawn from the capital stock of said banking association in violation of the statute in such case made and provided.

V.

That said defendant was paid and received and has ever since retained and now retains the said sum of seventeen hundred and fifty dollars ($1,750), so wrongfully paid out as aforesaid, with full knowledge that there were at such time no net profits of said bank, and that said dividend was wrongfully withdrawn from the capital stock of said bank.

That this plaintiff has demanded of the defendant the repayment of said sum of seventeen hundred and fifty dollars ($1,750), but he refuses to pay the same or any part thereof, and the said sum, with interest from the 2nd day of January, 1884, is now due and remains wholly unpaid.

Wherefore plaintiff asks judgment against the defendant for the sum of eight thousand seven hundred and fifty dollars ($8,750), with interest upon seven thousand dollars ($7,000) thereof from September 28th, 1885, and with interest upon seventeen hundred and fifty dollars ($1,750) thereof from January 2nd, 1884.

And for costs of suit.

(Signed) EDWARD O. WOLCOTT,
Att'y for Pl'tff.

14 STATE OF COLORADO,
County of Lake, } *ss:*

J. Sam. Brown, being first duly sworn, deposes and says that he is the plaintiff in the above-entitled action and is the receiver of the First National Bank of Leadville; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

(Signed) J. SAM. BROWN.

Subscribed and sworn to before me this 14 day of July, A. D. 1886.

(Signed) GEO. L. BROWN,
[NOTARIAL SEAL.] *Notary Public.*

(Endorsed:) No. 1966. In U. S. circuit court. J. Sam. Brown, rec'r, &c., compl'nt, *vs.* Nicholas Finn, defendant. Filed Jul- 19, 1886. (Signed) Edward F. Bishop, clerk. Edw'd O. Wolcott, att'y for pl'ff.

And afterwards and on, to wit, the 27th day of August, A. D. 1886, came the said defendant, by Parsons & Lyles, Esqrs., his attorneys, and filed in said court and in said cause his answer to the amended complaint heretofore filed herein.

15 And the said answer is in the words and figures as follows, to wit:

Answer.

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

In the Circuit Court of the United States within and for said District.

J. SAM. BROWN, Receiver of the First National Bank of Leadville, Plaintiff,
vs.
NICHOLAS FINN, Defendant.
} Answer.

The defendant, Nicholas Finn, for his answer to the first cause of action contained in the amended complaint of the plaintiff—

Denies that at the time therein stated or at any other time he became the holder of fifty shares of the capital stock of the First National Bank of Leadville, of the par value of one hundred dollars each or of any other value, and denies that he became the holder of any shares of said capital stock of said bank, except as hereinafter admitted.

Defendant admits that on or about the 12th day of December, 1883, he became the holder of twenty shares of said capital stock, of the par value as stated in said complaint.

Defendant denies that on the 29th day of October, 1883, or at any other time there was duly or otherwise issued to this defendant a
certificate of stock, numbered sixty-three (63) or otherwise,
16 for fifty shares of said capital stock, but defendant admits that
at the time stated in said complaint there was issued to him
a certain certificate for said twenty shares of stock.

Defendant denies that ever since said last-named date or at the date of the failure and suspension of said banking association he was or now is or ever was a shareholder of said bank to the extent of seventy (70) shares of said capital stock or of any number of such shares of any value whatever, except the twenty shares therein hereinbefore admitted to be owned by this defendant.

Defendant, further answering, avers that as to the several matters and things set forth in the second paragraph of said first cause of action this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

Defendant denies that by virtue of the assessment and requisition of the Comptroller of the Currency of the United States, as alleged in said complaint or otherwise, there became due from this defendant the sum of seven thousand dollars or any other sum whatever, except as hereinafter stated.

Defendant admits the notice alleged in the third paragraph of said first cause of action and admits that at the time of the commencement of this action he had not paid such assessment or any part thereof, but denies that there was due from this defendant to the plaintiff the sum of seven thousand dollars, with interest, as alleged in said complaint, or any sum whatever, except as hereinafter admitted.

The defendant, further answering said first cause of action, alleges that on the 12th day of December, 1883, he became by purchase the owner and holder of twenty shares of the capital stock of said First National Bank of Leadville, and no more, and was the owner thereof at the date of the failure and suspension of
17 said banking association; that the par value of said shares of stock was one hundred dollars each; that at the time of the commencement of this suit defendant was liable as a stockholder of said bank upon said shares of stock to the amount of the par value thereof, being the sum of two thousand dollars and interest thereon from the date of the assessment and requisition of the Comptroller of the Currency of the United States upon him as such stockholder.

Defendant further alleges that after the commencement of this action and on, to wit, the 13th day of July, A. D. 1886, he paid to the plaintiff the full amount due from him as such stockholder according to the assessment and requisition of the Comptroller of the Currency, and obtained from said plaintiff a full release and discharge from any and all liability as the owner and holder of said twenty shares of stock of said banking association.

The defendant, for his answer to the second cause of action set forth in the amended complaint of the plaintiff—

Admits that on the 2d day of January, A. D. 1884, and from the 12th day of December prior thereto he was a stockholder of the said First National Bank of Leadville, but denies that at the time stated in said cause of action he was a director or was ever at any time acting cashier of said bank.

That as to whether or not on the 2d day of January, A. D. 1884, the said First National Bank of Leadville, by its board of directors, fraudulently or wrongfully declared or caused to be declared a dividend of twenty-five per cent. (25) upon its capital stock to be paid to the shareholders of said bank this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

18 Defendant denies that as director of said bank or otherwise he was present at the meeting of said board of directors at which said or any dividend was declared, and denies that he united in said alleged action with full or any knowledge of the insolvency of said bank or otherwise.

Defendant denies that on the 2d day of January, A. D. 1884, or at any other time he was the holder of seventy shares of the capital stock of said bank of the par value of seven thousand dollars, and denies that he then and there or at any time or place as such shareholder or otherwise received the sum of seventeen hundred and fifty dollars or any sum whatever except as hereinafter stated as his proportion of said dividend of twenty-five per cent. so declared by said board of directors; but the defendant admits that at the time stated in said complaint he received a dividend of twenty-five per cent. upon twenty shares of the capital stock of said banking association owned and held by him at that time.

Defendant denies that he was paid or that he has received or that he has retained or that he ever received or retained the said sum of seventeen hundred and fifty dollars or any part thereof, with full or any knowledge that there were at such time no net profits of said bank or that said dividend was wrongfully withdrawn from the capital stock of said bank, and again denies that he ever at any time or place received the sum of seventeen hundred and fifty dollars as and for dividends upon seventy shares of the capital stock of said banking association or any sum whatever except the sum of five hundred dollars, which he received as dividends upon the twenty shares of stock of said bank owned by him as hereinbefore stated.

19 Defendant denies that there is due to the plaintiff the said sum of seventeen hundred and fifty dollars as stated in said second cause of action or any part thereof.

Wherefore the defendant prays that he may be hence dismissed with his reasonable costs.

(Signed) PARSONS & LYLES,
Attorneys for Defendant.

STATE OF COLORADO, } ss:
County of Lake, }

Nicholas Finn, being duly sworn, deposes and says that he is the defendant named in the foregoing pleading; that he has heard the foregoing answer read and knows the contents thereof; that the several matters and things therein contained are true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters he believes them to be true.

(Signed) NICHOLAS FINN.

Sworn to by the said Nicholas Finn before me and subscribed by him in my presence this 25th day of August, A. D. 1886.

(Signed) JAMES B. KNOBLOCK,
[NOTARIAL SEAL.] *Notary Public.*

(Endorsed:) 1966. Circuit court of the United States. J.
20 Sam. Brown, receiver, *vs.* Nicholas Finn. Answer to amended
complaint. Filed Aug. 27, 1886. (Signed) Edward F.
Bishop, clerk. Parsons & Lyles, att'ys for defendant.

And afterwards and on, to wit, the 8th day of September, A. D. 1886, came again the said plaintiff, by his attorney aforesaid, and filed in said court and said cause his replication to the answer heretofore filed herein.

And the said replication is in words and figures as follows, to wit:

Replication.

UNITED STATES OF AMERICA, } *ss*:
District of Colorado, }

In the Circuit Court.

J. SAM. BROWN, Receiver of the First National Bank of Leadville, Plaintiff, } Replication.
vs.
NICHOLAS FINN, Defendant. }

Comes now the plaintiff herein, by Edward O. Wolcott, his attorney, and for replication to the answer of the defendant to the first cause of action in plaintiff's complaint set forth—

Plaintiff denies that at the time mentioned in the complaint or at any other time the defendant obtained from said plaintiff a full release and discharge from all liability as the owner and holder
21 of twenty (20) shares of stock of the said banking association,
as in said answer alleged.

(Signed) EDWARD O. WOLCOTT,
Plaintiff's Attorney.

V.

(Endorsed:) 1966. In U. S. circuit court. J. Sam. Brown, rec'r, &c., plaintiff, *v.* Nicholas Finn, defendant. Replication. Filed Sep. 8, 1886. (Signed) Edward F. Bishop, clerk. Edw'd O. Wolcott, att'y for pl'ff.

And afterwards and on, to wit, the 30th day of November, A. D. 1887, the same being one of the regular juridical days of the November term, A. D. 1887, of said court—present, the Honorable Moses Hallett, district judge—the following proceeding was had and entered of record in said court and in said cause, to wit:

Order: Trial, Finding for Plaintiff.

J. SAM. BROWN, Receiver of the First National Bank of Leadville, } 1966. Money Demand.
vs.
NICHOLAS FINN. }

At this day comes the said plaintiff, by E. O. Wolcott Esq., his attorney, and the said defendant, by C. C. Parsons, Esq., his attorney, also comes.

22 And thereupon comes a jury, to wit, J. W. Sanderson, J. C.
Evans, Herman H. Heiser, John R. Biggar, Edward Kerstens, L. T. Brooks, H. T. West, J. W. Thomas, D. W. Fall, A. E. Bartlett, T. C. Sewell, Clarence B. Kimball, twelve (12) good and lawful men; and they are duly selected and tried, impaneled and sworn, to well and truly try the issues herein joined and true verdict render according to the evidence.

And the said jurors, having heard the evidence produced herein and the instructions of the court, upon their oaths do say they find for the plaintiff and assess the damages at seven thousand eight hundred and thirty-three dollars and thirty-three cents ($7,833.33).

And afterwards and on, to wit, the 6th day of March, A. D. 1888, the same being one of the regular juridical days of the November term, A. D. 1887, of said court—present, the Honorable Moses Hallett, district judge—the following further proceeding was had and entered of record in said court and in said cause, to wit:

Order: Judgment, Time for Bill of Exceptions.

J. SAM. BROWN, Receiver of the First National Bank of Leadville,
vs.
NICHOLAS FINN.
} 1966. Money Demand.

23 At this day comes the said plaintiff, by J. F. Vaile, Esq., his attorney, and the said defendant, by C. S. Thomas, Esq., his attorney, also comes.

And the motion of the said defendant for a new trial of the issues herein joined having heretofore come on to be heard and having been argued by counsel and by the court taken under advisement, and the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be denied.

Wherefore it is considered by the court that judgment be entered upon the verdict of the jury herein in favor of the said plaintiff and against the said defendant for seven thousand eight hundred and thirty-three dollars and thirty-three cents ($7,833.33) and the said plaintiff's costs, to be taxed.

And day until sixty (60) days from this day is allowed the said defendant to file herein his bill of the exceptions reserved by him upon the trial of the issues herein joined; and let supersedeas bond upon writ of error herein be in the sum of four thousand dollars ($4,000.00).

And thereupon and on the same day, to wit, the 6th day of March, A. D. 1888, judgment was duly entered against the said defendant in the judgment book of said court, in pursuance of the statutes and rules of court.

And the said judgment is in words and figures as follows, to wit:

Judgment.

23½ J. SAM. BROWN, Receiver of the First National Bank of Leadville,
vs.
NICHOLAS FINN.
} 1966. Money Demand.

On this 6th day of March, A. D. 1888, the same being one of the regular juridical days of the November term, A. D. 1887, of said court, there being present the Honorable Moses Hallett, district judge—

It is considered by the court that the said plaintiff do have and recover of and from the said defendant seven thousand eight hundred and thirty-three dollars and thirty-three cents ($7,833.33), his damages by occasion of the premises in his complaint mentioned, in form aforesaid assessed, and his costs by him in this behalf laid out and expended, to be taxed, and have execution therefor.

And afterwards and on, to wit, the 31st day of May, A. D. 1888, came again the said defendant, by his attorneys aforesaid, and filed in said court and in said cause his bill of the exceptions reserved by him upon the trial of the issues herein joined.

And the said bill of exceptions is in words and figures as follows, to wit:

Bill of Exceptions.

24 UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

In the Circuit Court of the Eighth Judicial Circuit in and for said District of Colorado.

J. SAM. BROWN, Receiver, Plaintiff, }
vs. } No. 1966.
NICHOLAS FINN, Defendant. }

Be it remembered that at the November term, 1887, of said court, said cause coming on to be heard, plaintiff appeared, by E. O. Wolcott, Esq., and J. F. Valie, Esq., his attorneys, and the defendant, by C. C. Parsons, Esq., and C. S. Thomas, Esq., his attorneys, also came; and thereupon plaintiff, to maintain the issues in his behalf, gave evidence as follows:

J. SAM. BROWN, the plaintiff, being duly sworn to maintain the issues on his part, gave evidence tending to show that he was the regularly designated receiver of the First National Bank of Leadville, which closed its doors on, to wit, the 22d day of January, 1884; that immediately thereafter L. C. Ellsworth was appointed receiver of said bank, and thereupon took possession and dischargod the duties of such receiver until, to wit, the 1st day of February, 1884, when he, having resigned, plaintiff was appointed in his place, since which time he has been engaged in winding up the affairs of the concern; that Nicholas Finn, the defendant, was vice-president of said bank at the time of its failure, and had been discharg-
25 ing the duties of such position since the 21st day of November, 1883; that it appeared from the book of share certificates that the said defendant was at the time of the failure of said bank the owner of seventy shares of the stock of the said bank, which was of the par value of one hundred dollars per share; that, the assets of the said bank not being sufficient to pay the liabilities thereof, the Comptroller of the Currency issued an order assessing the shareholders of said bank *a* amount equal to the par value of their said

stock, in consequence of which, prior to the beginning of this suit, the defendant had been notified of said assessment and requested to pay; that the said defendant had paid the sum of two thousand dollars since the bringing of the said suit upon twenty shares of stock, but had denied his liability as to the remainder.

The plaintiff also gave in evidence tending to show that according to the stubs of the book of certificates and as shown by the stock register fifty shares of stock had been transferred to the defendant Finn by the issuance of a certificate for that number of shares, bearing date the 29th day of October, 1883, forty shares of which *was* issued to him from the stock of one McNany and ten shares from the stock of Frank W. De Walt, the president of said bank; that these fifty shares constituted the only stock standing in the name of the defendant until the 12th day of December, 1883; that on, to wit, the 30th day of October, 1883, at a directors' meeting, it appeared that the defendant had been elected a director of said First National Bank of Leadville, and on the same day, to wit, the 30th day of October, of said year, at a directors' meeting, it appeared that 26 the said defendant was elected vice-president of said bank; that on the 21st day of November, 1883, at a meeting of the directors, at which Nicholas Finn, the defendant, was present and voting, the resignation of P. J. Sours, cashier, was accepted, and the defendant, as vice-president, was authorized to act as cashier until a new cashier should be regularly appointed, and that on the same day the defendant Finn and De Walt, president of the bank, were authorized to pass judgment on all notes, etc., offered for discount; that immediately thereafter the defendant, as vice-president, wrote a number of letters to correspondents of said bank in the East, notifying them of the resignation of Mr. P. J. Sours, cashier of said bank, and enclosing his own signature, which was to be recognized upon bills of exchange, &c., subsequent to that time.

The plaintiff also introduced a large number of certificates of deposit and bills of exchange which had been issued by the said First National Bank of Leadville and signed by the said defendant as vice-president, ranging between the 21st day of Nov'r, 1883, and the 12 day of December, 1883, and also a large number of like certificates and bills of exchange issued between Dec. 12, 1883, and January, 22, 1884, all signed by the def't as vice-pres't.

Plaintiff also gave evidence tending to show that on, to wit, the 2d day of January, 1884, a dividend of twenty-five per cent. upon the capital stock of said bank had been declared and the sum of $1,750.00 had been transferred to the credit of the said defendant as his share of such dividend on seventy shares of stock, and that at the time of the declaration of such dividend the said bank was utterly and entirely insolvent and was wholly unable to 27 pay the amount of its indebtedness then in existence, in consequence of which said declaration of dividend was fraudulent and in derogation of the national banking act and of the rights of the creditors of said bank; also that according to the record of the meeting of directors at which said dividend was declared, as the same was written up, the defendant Finn was present and seconded the motion to declare such dividend.

And thereupon it was admitted that the Comptroller of the Currency had levied the assessment mentioned by the plaintiff, and that demand had been made for the payment thereof by the said plaintiff prior to the commencement of suit.

The plaintiff, on cross-examination, gave evidence tending to show that no regular stock book was kept in said bank, but that a list of stockholders and of transfers of stock appeared in one of the books of the said bank, in which was entered the sum of fifty shares of stock to the credit of the said defendant on the 29 day of October, 1883, and the additional number of twenty shares of stock which *was* purchased by the defendant from one P. J. Sours on the 12 day of December, 1883; that no demand had ever been made upon Frank W. De Walt *of* McNany for the payment of the assessment upon the fifty shares of stock mentioned; that the defendant, upon demand being made for the amount of money due upon said fifty shares of stock, ha*d* denied that he was liable thereon, claiming that the said stock was transferred to him without his knowledge or consent, and recognizing his liability upon the twenty shares of stock purchased from said Sours to be the sum of two thousand dollars.

Upon cross-examination with reference to the books of account
the witness gave evidence tending to show that no transfer
28 appeared on said books, either to the credit of De Walt or McNany, from the defendant of the sum of five thousand dollars or any other sum for the said shares of stock so transferred to his name on said books.

Witness further gave evidence tending to show that the certificate for the fifty shares of stock first issued was not among the papers of the said bank so far as he had been able to ascertain.

The witness further gave evidence tending to show that the record upon the entry book of the First National Bank of Leadville of the declaration of dividend was in a feminine handwriting and wholly different from the other entries entered upon said book.

The witness also gave evidence tending to show that on, to wit, the 9th day of January, 1884, the sum of $1,250.00 was credited to the individual account of Frank W. De Walt, the president of said bank, and that on the same day the sum of $1,250 was charged up to the account of the defendant on said books.

Of which certificates of deposit introduced in evidence in connection with this witness' testimony and signed by the defendant Finn the following is a sample:

Colorado First National bank.

$25,000.00. LEADVILLE, COL., *Dec. 28th*, 1883.

This certifies that F. W. De Walt, p't, has deposited in this bank twenty-five thousand dollars, payable to the order of self, escrow, on return of this certificate properly endorsed.

No. 42791. N. FINN, *V. P.*

C. B. WHITTELSEY, *Teller.*

29 Of which drafts and bills of exchange similarly executed the following is a sample:

Colorado First National bank.

$741.92. LEADVILLE, COL., *Nov.* 24, 1883.

Pay to the order of Farmers' bank, Sterling, Kas., seven hundred forty-one & $\frac{92}{100}$ dollars.
Duplicate unpaid
To First National bank, New York city.
No. 54918. N. FINN, *V. P.*

L. C. ELLSWORTH, called and sworn for the plaintiff, gave evidence tending to show that on the 24th day of January, 1884, he was appointed receiver of the First National Bank of Leadville by the Comptroller of the Currency and entered upon the discharge of his duties, taking possession of all books, assets, &c., belonging to the said bank, and that afterwards and on or about the 1st day of February, 1884, he resigned and turned over the said books, assets, accounts, &c., to the plaintiff as his successor in trust; that his examination of the books of said bank showed that it was insolvent on Jan. 2d, 1884.

And thereupon plaintiff rested.

30 The defendant thereupon called P. J. SOURS, who, being duly sworn according to law, gave evidence tending to show that during the greater part of the year 1883 he was cashier of the First National Bank of Leadville and tendered his resignation of said office on or about the 29 day of October, 1883, at which time he was the owner of twenty shares of the stock of said bank; that his written resignation was handed to Frank W. De Walt, the president of said bank, who asked if it was intended as in earnest, and, being informed that it was, replied, "All right;" that on the 29 day of October, 1883, De Walt had instructed witness to issue a certificate of stock for fifty shares in the name of the defendant, transferring forty shares thereof from the stock of one McNany, the brother-in-law of said De Walt, and ten shares from the stock of said De Walt; that witness wrote the certificate and signed it as cashier pursuant to said instructions and left the same in the book of certificates; that he did not see the defendant at the time nor for a long time thereafter, nor did he ever deliver to the defendant the said certificate of shares and was not further connected with the transaction.

That witness afterwards and on the 21 day of Nov., 1883, attended a meeting of the directors of said First National bank at which time his resignation as cashier was accepted, it being the meeting whereat the defendant was elected a member of said board, and on the 21st day of November, 1883, at a meeting attended by the defendant, the said defendant was elected vice-president and witness' connection with the bank ceased; that shortly thereafter witness attempted to sell his stock to De Walt, who finally agreed to find a purchaser at $120.00 per share, being a premium of $20.00; that the
31 next day witness called at the bank pursuant to said arrange-

ments, at which place and time the defendant handed the witness his check for $2,400.00, the amount agreed upon as the price for said twenty shares, whereupon the witness handed the defendant his certificate duly assigned for his twenty shares. This was on Dec. 12, 1883.

On cross-examination the witness gave evidence tending to show that as cashier it was customary for him to sign new certificates of stock as issued, and that he was the executive officer of the bank; that he tendered his resignation because he was not satisfied with the manner in which said bank was conducted and had his fears of coming disasters, but said nothing concerning that matter to any one; that save for the entries on the books of certificates he would not now recollect of having individually signed the certificate for fifty shares issued in the name of the said defendant; that from the time of the transfer of his stock to the defendant witness has had no connection with or knowledge of the affairs of the said bank and knew nothing about the manner in which its business was conducted, except that no cashier had been elected to take his place, the duties of that office having been performed by the defendant; that witness ceased his active connection with said bank after the election of defendant to the position of vice-president and before he disposed of his stock to the defendant.

CHARLES MATER, being duly sworn for defendant, gave evidence tending to show that he was a director of the First National Bank of Leadville during 1883 and up to and including the day of its suspension.

32 Witness was shown an entry in the book of records of the First National bank held on the 2 day of January, 1884, where a dividend of twenty-five per cent. was declared. Witness could not recognize the handwriting, but thought it was that of a n*eic*e of F. W. De Walt, and said he could not remember certainly, but was almost positive that he never attended a directors' meeting which declared such a dividend and had no official knowledge of such dividend at the time; that he had no active connection with the affairs of said bank and was informed by De Walt that the dividend had been declared, which was his first knowledge of the fact.

NICHOLAS FINN, being sworn on his own behalf, gave evidence tending to show that he had been a resident of Leadville, Lake county, Colorado, since the summer of 1879, prior to which time he had been engaged in the business of shipping in vessels on Lake Michigan, with headquarters at Chicago; that with one Michael J. Cummings he commenced the business of smelting in 1879 and conducted said business until the fall of 1883, when he sold out, together with his partner; that up to that time he had never had any connection with any banking institution and knew little or nothing about the business of banking; that during the latter part of October, 1883, and at the time when fifty shares of stock were said to have been transferred to his name he was at Cañon City, in the State of Colorado, and had no knowledge of said transfer whatever; that

after a day or two thereafter he returned to the city of Leadville and was urged by F. W. De Walt, the president of the First National Bank of Leadville, to invest in the stock of said bank and be-
33 come one of the active officers of the institution, which he finally consented to do; that at or about said time and on, to wit, the 21st day of November, 1883, he was elected a director of said institution, he being present at said meeting; that at said meeting and on the 21st day of November, 1883, witness was elected vice-president of said bank by the directors and at once entered upon the discharge of his duties; that, having been so elected as a director, he was urged to obtain some stock in said institution, and was informed by De Walt that twenty shares of stock could be secured of P. J. Sours for a premium of $20.00 per share, and was advised by the said De Walt to take it, said De Walt representing the said bank to be in a highly prosperous condition, and witness thereupon purchased said twenty shares of stock from said Sours and had the same transferred to his own name on the books and took his certificate therefor; that from the time of his election as vice-president he performed some of the business of the bank, had his headquarters in the bank, wrote some letters, signed some certificates of deposit and bills of exchange, the business being of a routine character, and he having little knowledge of the books and no knowledge of the condition of the bank and relying almost entirely upon the representations and management of the said De Walt, the president, he had practically no connection with the business of the said bank; that he never had in his possession a certificate for fifty shares of stock or any other shares of stock in said bank save and except the 20 shares before referred to as purchased from Sours, nor did he have any knowledge, direct or indirect, of the fact that the said De Walt had had transferred to himself fifty shares or any other number of shares of the stock thereof; that on, to wit, the 2 day of January, 1884, he was informed by the said De Walt that
34 a dividend had been declared of twenty-five per cent., and on the same day he was also informed by either E. T. Wolfert or Mr. Whittlesey, the paying teller of the bank, that $1,750.00 on account of dividends had been transferred by order of Mr. De Walt to his credit; that, being the owner of but twenty shares of stock, witness was at a loss to know why $1,750.00 should be transferred to his credit and at once enquired of De Walt about it, when for the first time he was informed that, in addition to the said twenty shares, fifty shares of stock had been transferred to his credit and stood in his name upon the books of said bank, in consequence of which $1,250.00 had been transferred to his credit as soon as the dividend was declared as aforesaid; that witness made enquiry of said De Walt why the said fifty shares of stock were in his name, and was informed that they had merely been so transferred because he, De Walt, thought the witness might desire to purchase same as a good investment; that witness thereupon and at once repudiated the transaction and refused to purchase said stock or have anything to do with —, and ordered the said De Walt to retransfer the same back to his own name, and that he wanted it done without delay; that witness

immediately sat down and drew his check for the said sum of $1,250.00, the amount of said dividend, to the order of said De Walt, and immediately handed the same to the said De Walt.

The said check was here offered in evidence, and is in words and figures following—that is to say:

No. —. LEADVILLE, COL., *January 2nd*, 1884.

First National Bank.

35 Pay to the order of F. W. DeWalt twelve hundred & fifty dollars.

$1,250.00. (Copy.) NICHOLAS FINN.

That said check was duly charged on the books of said bank to the witness and credited to the account of said De Walt.

That almost immediately after the transaction which resulted in the drawing of said check witness was summoned upon a venire of jurors to attend the district court in and for the county of Lake and State of Colorado, and was drawn upon the jury in the case of the Iron Silver Mining Company *vs.* Campbell and Others, which kept him in attendance upon said court almost constantly until the 21st day of January, 1884, the *the* day but one previous to the suspension of said bank; that during a part of said term of service witness was confined, with the other jurors, and was *nor* permitted to separate from them; that the said jury agreed late on Saturday night, and the next day witness was busily engaged in looking after the affairs of said bank, and did not think of said stock or whether said — had been retransferred by the said De Walt; that the bank almost immediately suspended, and witness since that time has had no further connection with the affairs of said bank.

Witness was shown an entry of an alleged meeting of directors for the declaration of a dividend on the 2nd day of January, and gave evidence tending to show that he had never attended a meeting of the directors for that purpose and knew nothing about the fact, and knew nothing of the fact that *that* the books contained such an entry, nor did he personally have knowledge of the declaration of the dividend beyond the statement of said De Walt
36 that such a dividend had been declared.

Witness recognizes the handwriting as being that of a lady cousin of the said De Walt, and testified, according to his best information, that the said entry was written at the house of De Walt and not at the bank.

Witness further testified that, recognizing his liability on twenty shares of stock owned by him,--paid the plaintiff after the commencement of this suit the sum of two thousand dollars and was prepared and expected to pay the sum of five hundred dollars, the amount of said dividend so fraudulently declared on said twenty shares which he owned.

That he had never examined the book of certifi-ates of shares or any other entry or any other book with reference to the shares of stock, and until his notification of the placing of $1,750.00 as dividends to his credit witness had not even a suspicion that any stock, *safe* twenty shares purchased from Sours, had been for any purpose by any person placed in his name.

On cross-examination the witness gave evidence tending to show that he had in connection with De Walt fulfilled the duties of cashier of the said bank from the time of his election *of* vice-president and had had his office at no other place than the bank and had been engaged in no other business; that he knew but little about the business of banking, and that for the greater part had been learned during his connection with this institution; that he had no knowledge of its insolvent condition and relied entirely upon the president, F. W. De Walt, in whom witness had perfect confidence; that De Walt had assured him from time to time that the bank was doing a large business and making money, and that the shares of stock 37 which he held in the bank were a profitable investment; that he h-d but little money at the time, and could not therefore afford to have purchased the fifty shares of stock in controversy had he been so disposed, and had never paid anything thereon; that he had not, to the best of his recollection, sworn that the bank was in good condition on the first day of January, but that as one of the directors attested a sworn statement of the said condition of the said bank, which was verified by the president, Frank W. De Walt; that at the time of the declaration of the said dividend he was of the belief that the president had the right to set apart from the proceeds or profits of the bank such an amount as would represent the dividend which might be declared, and paid no further attention to it after that. He was not aware that the bank was then insolvent and not in condition to pay its own debts, and was unaware at the time of the suspension of said bank there was less than one hundred dollars in currency on hand.

Witness denied that he was present with De Walt at the house of the latter on the night of the failure of the bank beyond the fact that he was in the house, that being his regular place of living, he having secured a sleeping-room in the house of De Walt at the time and occupied the same for some months previous to the failure of said bank; that if De Walt destroyed any of the account books of said bank at that time or at any other time witness was wholly unaware of it and he had no connection with such transaction.

The above was all the evidence given on the trial of said cause.

38 And thereupon the court *declined* counsel to submit said cause to the jury; to which defendant, by his counsel, then and there excepted.

And thereupon the court instructed in effect that under the evidence of the defendant himself, as well as of the testimony of the defense, the defendant was estopped from denying his ownership of the stock in controversy, and inasmuch as he had repaid the $1,250.00 in dividends not to the bank, but to Frank W. De Walt, he had not refunded the amount thereof in the manner which he should have done, and instructed the jury to find a verdict for the amount of the par value of said stock, at one hundred dollars per share, and interest on the par value of said stock, at the rate of ten per cent. per annum from the date of the demand for payment thereof by the receiver, together with $1,750.00 dividends; to the giving of which instructions the defendant, by his counsel, then and there excepted.

And thereupon the defendant, by his counsel, asked the court to give the jury the following instructions:

I.

The court instructs the jury that where it is necessary to hold a certain number of shares of stock in a national bank in order to be qualified to act as a director, the mere fact that a person accepts the office of director does not make him a stockholder in respect to the number of shares necessary to qualify him so to act. It simply implies an agreement that he will qualify within a reasonable time, and he may so qualify himself within a reasonable time by the purchase of at least ten shares of stock.

But the court refused to give such instruction, and to the refusal of the court to give which the defendant, by his counsel, then and there excepted. 39

II.

The court further instructs the jury that the national bank act does not make it a condition precedent to election as a director that he shall own ten shares of stock, but that the provisions in said act are complied with if within a reasonable time after his election he thus qualifies himself by the purchase of the requisite number of shares provided by law as a qualification of a director.

But the court refused to give said instruction, and to the refusal of the court to give which the defendant, by his counsel, then and there excepted.

III.

That the mere fact of election of the defendant to the office of director is not sufficient to charge him as a stockholder, provided within a reasonable time he purchases or acquires the requisite number of shares provided by law as a qualification of a director of a bank; that the fact that the defendant was elected and acted as a director will only imply on his part an agreement to qualify himself by the acquisition of the requisite number of shares within a reasonable time after his election.

But the court refused to give said instruction, and to the refusal of the court to give which the defendant, by his counsel, then and there excepted.

IV.

The court further instructs the jury that if they find from the evidence that on November 21st, 1883, the defendant was elected director of the First National Bank of Leadville and ac- 40 cepted such office, and if at that time he was negotiating for the purchase of twenty shares of stock from one P. J. Sours, and that he did within a reasonable time thereafter purchase said shares of stock, that the defendant qualified himself as a director without reference to the fifty shares of stock that had been before that time and on the 29th day of October, 1883, transferred to him on the books of the company.

But the court refused to give said instruction, and to the refusal of the court to give which the defendant, by his counsel, then and there excepted.

V.

The court further instructs the jury that if they find from the evidence that on the 29th day of October, 1883, F. W. De Walt, the then president of the First National Bank of Leadville, transferred or caused to be transferred upon the books of the bank fifty shares of stock to the defendant without the defendant's knowledge or consent and without any consideration having been paid therefor, and if they further find that the defendant, as soon as his attention was called to said transfer and as soon as he had knowledge of that fact, instantly repudiated the transaction and refused to be bound by said transfer and refused to accept the stock so transferred to him, then he is not the owner of the said fifty shares of stock and not liable for any assessment thereon.

But the court refused to give said instruction, and to the refusal of the court to give which the defendant, by his counsel, then and there excepted.

VI.

41 The court further instructs the jury that if the fifty shares of stock mentioned in the complaint was transferred to the defendant on October 29th, 1883, without the knowledge or consent of the defendant, and that as soon as that fact came to the knowledge of the defendant he repudiated the transfer and refused to accept the stock so transferred and immediately paid back the dividend which was passed to his account upon the books of the bank to the transferor, then he is not liable for the said sum of $1,250.00, which represents the dividend declared on January 2nd, 1884, upon said fifty shares of stock.

But the court refused to give said instruction, and to the refusal of the court to give which the defendant, by his counsel, then and there excepted.

VII.

The court further instructs the jury that the burden of proof is upon the plaintiff to establish by a fair preponderance of testimony that the transfer of the fifty shares of stock to the defendant on October 29th, 1883, was made with the knowledge and consent of the defendant, or that after such transfer the defendant, with full knowledge of all the facts, accepted and ratified the same; and that this rule also applies to the $1,250.00 of dividend upon said stock, for the recovery of which this action is in part brought.

But the court refused to give said instruction, and to the refusal of the court to give which the defendant, by his counsel, then and there excepted.

And thereupon the jury, following the instructions of said court, returned a verdict in favor of the plaintiff and against the defendant for the sum of seven thousand eight hundred and
42 thirty-three dollars and thirty-three cents.

And thereupon the defendant, by his counsel, filed a motion for a new trial; which said motion is in words and figures following, to wit:

Now comes the defendant above named and moves the court to set aside the verdict and judgment heretofore and on the 30th day of November, A. D. 1887, entered and rendered in this case and for a new trial thereof, for the reasons—

I. That the court erred in withdrawing said case from the consideration of the jury.

II. That the court erred in refusing to submit said case to the determination of the jury upon the questions of fact raised by the pleadings.

III. That the court erred in refusing to give to the jury the instructions prayed for by the defendant, and each and every of them.

IV. The court erred in admitting testimony offered by the plaintiff against the objection of the defendant.

V. That the court erred in the instructions given the jury of its own motion.

VI. That the court erred in refusing to admit testimony offered by the defendant and sustaining the objections of the plaintiff to the admission of such testimony.

VII. That the verdict is against the law.

VIII. That the judgment entered upon such verdict is contrary to law.

IX. That the judgment and verdict are against the weight of evidence in the case.

43 X. That the judgment is against the law of the case.

XI. That the court erred in rendering judgment against the defendant and in favor of the plaintiff.

XII. For other errors apparent upon the record.

But the court overruled the said motion for a new trial; to which the defendant, by his counsel, then and there excepted.

And thereupon the court rendered judgment upon the verdict against the defendant for the said sum of $7,833.33; to which action of the court the defendant, by his counsel, then and there excepted.

And, forasmuch as the foregoing matters and things do not fully appear of record, the defendant tenders this his bill of exceptions and prays that the same may be signed and sealed and thus be made a part of the record according to the statute in such case made and provided; which is accordingly done this 1st day of June, A. D. 1888.

(Signed) MOSES HALLETT, [SEAL.]
Dist. Judge.

(Endorsed:) 1966. J. Sam. Brown, rec'r, *vs.* Nicholas Finn. Bill excep'ns. Filed May 31, 1888. (Signed) William A. Willard, clerk.

And afterwards and on, to wit, the 31st day of May, A. D. 1888, came again the said defendant, by his attorneys aforesaid, and 44 filed in said court and in said cause his bond and sued out of said court a writ of error and citation to the Supreme Court of the United States.

And the said bond is in words and figures as follows, to wit:

Bond.

THE UNITED STATES OF AMERICA, }
District of Colorado. }

Know all men by these presents that I, Nicholas Finn, as principal, and P. Crowe and T. B. Ryan, as sureties, are held and firmly bound unto J. Sam. Brown, receiver, &c., of the First National Bank of Leadville, Colorado, in the full and just sum of four thousand dollars, to be paid to the said J. Sam. Brown, receiver, etc.; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this — day of March, in the year of our Lord one thousand eight hundred and eighty-*eighty*-eight.

Whereas lately, at the November term, A. D. 1888, of the circuit court of the United States for the district of Colorado, in a suit pending in said court between J. Sam. Brown, receiver, &c., and the said above-bounden Nicholas Finn, defendant, judgment was rendered against the said Nicholas Finn; and the said defendant having obtained a writ of error to reverse the judgment of said court and a citation directed to the said J. Sam. Brown, receiver, &c., citing and admonishing him to be and appear at a Supreme Court of the United States to be held at Washington on the second Monday of October next:

45 Now, the condition of the above obligation is such that if the said Nicholas Finn shall prosecute said writ to effect and answer all damages and costs if he fails to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

(Signed) NICHOLAS FINN. [SEAL.]
" P. CROWE. [SEAL.]
" T. B. RYAN. [SEAL.]

Approved:
(Signed) MOSES HALLETT, *Judge.*

Justification.

THE UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

P. Crowe and T. B. Ryan, sureties on the within bond, being each first duly sworn, deposes and saith that he is worth in real property the sum below set opposite his name—that is to say:

As to P. Crowe, four thousand dollars;
As to T. B. Ryan, four thousand dollars;
over and above all his just debts and liabilities and in property subject to levy and sale upon execution.

(Signed) P. CROWE.
" T. B. RYAN.

Subscribed and sworn to before me, at Leadville, this 14th day of April, A. D. 1888.

46 (Signed) JOS. H. PLAYTER,
[SEAL LAKE COUNTY.] *Clerk District Court, Lake County, Colo.*

(Endorsed:) Gen. No., 1966. Circuit court of the United States, district of Colorado. J. Sam. Brown, receiver, etc., *vs.* Nicholas Finn. Bond on writ of error. $4,000. Filed this 31st day of May, A. D. 1888. (Signed) William A. Willard, clerk, by F. W. Tupper, deputy clerk.

And the said writ of error, with the return of the clerk thereto, is next hereto attached, to wit:

Writ of Error.

47 Writ of error to circuit court U. S., district of Colorado.

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

The President of the United States to the judges of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, between J. Sam. Brown, receiver, etc., and Nicholas Finn, a manifest error hath happened, to the great damage of the said Nicholas Finn, as by said complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2d Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Samuel F. Miller, associate justice of the Supreme Court of the United States, this 31st day of May, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the 112th year.

Seal United States Circuit Court, District of Colorado.

WILLIAM A. WILLARD, *Clerk.*
F. W. TUPPER, *Deputy Clerk.*

Allowed by—
MOSES HALLETT, *Judge.*

47½ [Endorsed:] Gen. No., 1966. Circuit court of the United States. Nicholas Finn, plaintiff in error, *vs.* J. Sam. Brown, rec'r, &c. Writ of error to circuit court U. S., district of Colorado. Filed in circuit court of the U. S. this 31st day of May, A. D. 1888. William A. Willard, clerk, by F. W. Tupper, deputy clerk. Parsons & Lyles, Patterson & Thomas, attorney- for plaintiff in error.

The defendant having served this writ of error by lodging a copy thereof for the adverse party in the clerk's office within the time agreed by stipulation, and having given the security required by law on the issuing of the citation, this writ is therefore a supersedeas.

[Seal United States Circuit Court, District of Colorado.]

Teste:
WILLIAM A. WILLARD, *Clerk,*
By F. W. TUPPER, *Deputy Clerk.*

Return.

UNITED STATES OF AMERICA,
District of Colorado, } *ss:*

In obedience to the command of the within writ, I herewith transmit to the honorable Supreme Court of the United States, at Washington, D. C., a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court, at Denver, in said district, this 18th day of June, A. D. 1888.

[Seal United States Circuit Court, District of Colorado.]

WILLIAM A. WILLARD, *Clerk,*
By F. W. TUPPER, *Deputy Clerk.*

48 And the said citation is hereto attached, to wit:

Citation.

49 Citation U. S. circuit court.

THE UNITED STATES OF AMERICA, }
District of Colorado. }

The United States of America to J. Sam. Brown, receiver, etc., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Colorado, wherein Nicholas Finn is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the district court of the United States for the district of Colorado, this 31st day of May, in the year of our Lord one thousand eight hundred and eighty-eight.

MOSES HALLETT, *Judge.*

50 [Endorsed:] Gen. No., 1966. Circuit court of the United States, district of Colorado. Nicholas Finn, plaintiff in error, *vs.* J. Sam. Brown, rec'r, &c., defendant in error. Citation. Filed in circuit court of the U. S. this 31st day of May, A. D. 1888. William A. Willard, clerk, by F. W. Tupper, deputy clerk. Parsons & Lyles, Patterson & Thomas, attorney- for plaintiff in error.

Proof of Service.

THE UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

On this — day of ——, A. D. 18—, personally appeared —— —— before me, the subscriber, a clerk of the —— court of the United States for the district of Colorado, and makes oath that he delivered a true copy of the within citation to —— ——. Service accepted May 31, 1888, for def't in error.

WOLCOTT & VAILE,
By H. W. W.

Sworn to and subscribed before me this — day of ——, A. D. 18—.

—— ——, *Clerk,*
By —— ——, *Deputy Clerk.*

51 UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

I, William A. Willard, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the record and proceedings heretofore filed and entered of record in said court and in a certain cause lately in said court pending, wherein J. Sam. Brown, receiver of the First National Bank of Leadville, was plaintiff and Nicholas Finn was defendant, as fully and completely as the same still remain on file and of record in my office.

Seal United States Circuit Court, District of Colorado.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 18th day of June, A. D. 1888.

WILLIAM A. WILLARD, *Clerk*,
B- F. W. TUPPER, *Deputy Clerk*.

52 In the Supreme Court of the United States.

NICHOLAS FINN, Plaintiff in Error,
vs.
J. SAM. BROWN, Receiver, Defendant in Error.

Error to the Circuit Court of the United States in and for the District of Colorado.

Comes now the plaintiff in error and says that in the transcript of the record of said cause there is manifest error in this, to wit:

(1.) The circuit court erred in refusing to permit the said cause to go to the jury and in instructing them to find a verdict against the plaintiff in error.

(2.) The court below erred in instructing the jury that under the evidence of the defendant, as well as the testimony of the defence, the defendant was estopped from denying his ownership of the stock in controversy, and that inasmuch as he had repaid the $1,250.00 in dividends, not to the bank, but to Frank W. De Walt, he had not refunded the amount thereof in the manner which he should have done, and instructing the jury to find a verdict for the amount of the par value of said stock at one hundred dollars per share and interest on the par value of said stock at the rate of ten per centum from the date of the demand for payment thereof by the receiver, together with $1,750.00 dividends. (See folios 102–3.)

(3.) The court below erred in refusing to give to the jury the instruction asked for by defendant below, as follows (folio 104):

The court instructs the jury that where it is necessary to hold a certain number of shares of stock in a national bank in order to be qualified to act as a director, the mere fact that a person accepts the office of director does not make him a stockholder in respect to the number of shares necessary to qualify him so to act; it simply implies an agreement that he will qualify within a reasonable time, and he may so qualify himself within a reasonable time by the purchase of at least ten shares of stock.

53 (4.) The court below erred in refusing to give to the jury the instruction asked for by the plaintiff in error, defendant below, as follows (fol. 105):

The court further instructs the jury that the national bank act does not make it a condition precedent to election as a director that he shall own ten shares of stock, but that the provisions in said act are complied with if within a reasonable time after his election he thus qualifies himself by the purchase of the requisite number of shares provided by law as a qualification of a director.

(5.) The court below erred in refusing to give to the jury the instruction asked for by defendant below, as follows (folio 106):

That the mere fact of election of the defendant to the office of director is not sufficient to charge him as a stockholder, provided within a reasonable time he purchases or acquires the requisite number of shares provided by law as a qualification of a director of a bank; that the fact that the defendant was elected and acted as a director will only imply on his part an agreement to qualify himself by the acquisition of the requisite number of shares within a reasonable time after his election.

(6.) The court below erred in refusing to give to the jury the instruction asked for by defendant below, as follows (folio 107):

The court further instructs the jury that if they find from the evidence that on November 21st, 1883, the defendant was elected director of the First National Bank of Leadville and accepted such office, and if at that time he was negotiating for the purchase of twenty shares of stock from one P. J. Sours, and that he did within a reasonable time thereafter purchase said shares of stock, that the defendant qualified himself as a director without reference to the fifty shares of stock that had been before that time and on the 29th day of October, 1883, transferred to him on the books of the company.

(7.) The court below erred in refusing to give to the jury the instruction asked for by defendant below, as follows (folio 109):

The court further instructs the jury that if they find from the evidence that on the 29th day of October, 1883, F. W. De Walt, the then president of the First National Bank of Leadville, transferred or caused to be transferred upon the books of the bank fifty shares of stock to the defendant without the defendant's knowledge or consent and without any consideration having been paid therefor, and if they further find that the defendant, as soon as his attention was called to said transfer and as soon as he had knowledge of that fact, instantly repudiated the transaction and refused to be bound by said transfer and refused to accept the stock so transferred to him, then he is not the owner of the said fifty shares of stock and not liable for any assessment thereon.

(8.) The court below erred in refusing to give to the jury the following instruction asked for by defendant below, to wit (folio 110):

54 The court further instructs the jury that if the fifty shares of stock mentioned in the complaint was transferred to the defendant on October 29th, 1883, without the knowledge or consent of the defendant, and that as soon as that fact came to the knowledge of the defendant he repudiated the transfer and refused to accept the stock so transferred and immediately paid back the dividend which was passed to his account upon the books of the bank to the transferor, then he is not liable for the said sum of $1,250.00 which represents the dividend declared on January second, 1884, upon said fifty shares of stock.

(9.) The court below erred in refusing to give to the jury the following instruction asked for by the defendant below as follows, to wit (fol. 112):

The court further instructs the jury that the burden of proof is upon the plaintiff to establish by a fair preponderance of testimony that the transfer of the fifty shares of stock to the defendant on October 29th, 1883, was made with the knowledge and consent of the defendant, or that after such transfer the defendant, with full knowledge of all the facts, accepted and ratified the same, and that this rule also applies to the $1,250.00 of dividend upon said stock, for the recovery of which this action is in part brought.

(10.) The court below erred in refusing to grant the motion of defendant below for new trial, and in giving judgment upon the verdict.

Wherefore the plaintiff in error says that the judgment in said cause should be reversed, remanded, and wholly for naught held.

CHARLES S. THOMAS,
THOMAS M. PATTERSON,
Attorneys for Plaintiff in Error.

[Endorsed :] Supreme Court of the United States. Nicholas Finn, pl'ff in error, *vs.* J. Sam. Brown, rec'r, &c, def't in error. Assignment of error.

Endorsed on cover: Colorado C. C., U. S. No. 106. Nicholas Finn, plaintiff in error, *vs.* J. Sam. Brown, receiver of the First National Bank of Leadville. Filed September 20, 1888.

[illegible]

JAMES. H. McKENNEY,
CLERK.

IN

The Supreme Court

OF

The United States.

NICHOLAS FINN,
Plaintiff in Error,
vs.
J. SAM BROWN, Receiver,
Defendant in Error.

BRIEF AND ARGUMENT.

C. S. THOMAS,
C. C. PARSONS,
Attorneys for Plaintiff in Error.

C. J. Kelly, Law Printer, Denver, Colo.

IN

The Supreme Court

OF

The United States.

NICHOLAS FINN,
Plaintiff in Error,
VS.
J. SAM BROWN, RECEIVER,
Defendant in Error.

STATEMENT OF FACTS.

This action was brought by the defendant in error against the plaintiff in error upon his alleged liability as a shareholder in the First National Bank of Leadville.

The First National Bank of Leadville was a corporation organized in accordance with the laws of the United States, and doing business as a National Bank within the district of Colorado.

On the 22d day of January, A. D. 1884, this bank closed its doors, and immediately thereafter L. C. Ellsworth was appointed as its Receiver. He took possession of the concern and discharged the duties been transferred to him until the sum of $1,750 had been placed to his credit in the bank as dividend for the stock which he held, and that the certificate for said shares never was in his possession. When he was informed by the Paying Teller of the bank that said sum on account of dividends had been transferred by the order of DeWalt to his credit, he, being the owner of but twenty shares of stock, was at a loss to know why $1,750 should be transferred to his credit, and at once inquired of DeWalt about it. Then, for the first time, he was informed that, in addition to the twenty shares purchased from Sours, fifty shares of stock had been transferred to his credit by DeWalt and stood in his name upon the books of said bank. That in reply to witness' inquiry why the said fifty shares of stock were in his name, DeWalt informed him that they had merely been so transferred because he (DeWalt) thought plaintiff might desire to purchase the same as a good investment. That plaintiff thereupon and at once repudiated the transaction and refused to purchase the said stock or have anything to do with it, and ordered the said DeWalt to re-transfer the same to his own name, and that he wanted it done without delay, and that witness thereupon and immediately drew his check for the sum of $1,250—the amount of dividend upon said fifty shares of stock to the order of the said DeWalt—and handed the same to DeWalt, who received it and promised to make the transfer of the stock back to himself. This check was dated January 2, 1884, and was duly charged on the books of said bank to the plaintiff in error and credited to the account of DeWalt upon the same day. That almost immediately after the transaction, which resulted in the drawing of said check, the plaintiff in error was summoned upon a venire of jurors to attend the District Court for the County of Lake and State of Colorado, and was drawn upon the jury and was kept in close attendance and confinement upon said Court as a juror in the trial of a lengthy mining suit until the 21st day of January, 1884, being but one day previous to the suspension of the said bank. During the greater part of this time, plaintiff in error was confined with the other jurors, and was finally discharged late on Saturday night, the 21st day of January, 1884. The next day (Sunday), plaintiff in error was busily engaged in looking after the affairs of the bank and did not think of said stock, or whether the same had been re-transferred by the said DeWalt or not, and on the next day the bank suspended, since which time plaintiff in error has had no further connection with the affairs of said bank.

Plaintiff in error denied that he had ever examined the book of certificates of shares of stock, and until his notification of the placing of $1,750 to his credit as dividends, he did not even suspect that any stock save the twenty shares which he had purchased from Sours had been for any purpose, by any person, placed in his name. The Court, however, declined and refused to submit the cause to the jury, but instructed the jury that the defendant was estopped from denying his ownership of the stock in controversy, and, inasmuch as he had paid the $1,250 in dividends, not to the bank, but to Frank W. DeWalt, the jury was required and instructed to find a verdict for the amount of the par value of said stock, together with interest thereon at the rate of ten per cent per annum, together with the $1,750 as dividends, and, in pursuance of such requirement and instructions, the jury returned a verdict against the plaintiff in error and in favor of the defendant in error for the sum of $7,833.33.

ASSIGNMENTS OF ERROR.

Comes now the plaintiff in error and says that in the transcript of the Record of said cause there is manifest error in this, to wit:

1st. The Circuit Court erred in refusing to permit the said cause to go to the jury and in instructing them to find a verdict against the plaintiff in error.

2d. The Court below erred in instructing the jury that under the evidence of the defendant, as well as the testimony of the defense, the defendant was estopped from denying his ownership of the stock in controversy, and that, inasmuch as he had repaid the $1,250 in dividends, not to the bank, but to Frank W. DeWalt, he had not refunded the amount thereof in the manner which he should have done, and instructing the jury to find a verdict for the amount of the par value of said stock at $100 per share and interest on the par value of said stock at the rate of ten per centum from the date of the demand for payment thereof by the Receiver, together with $1,750 dividends. (See fols. 102 and 103.)

3d. The Court below erred in refusing to give to the jury the instruction asked for by defendant below, as follows (fol. 104):

"The Court instructs the jury that where it is necessary to hold a certain number of shares of stock in a National Bank in order to be qualified to act as a Director, the mere fact that a person accepts the office of Director does not make him a stockholder in respect to the number of shares necessary to qualify him so to act. It simply implies an agreement that he will qualify himself within a reasonable time, and he may so qualify himself within a reasonable time by the purchase of at least ten shares of stock."

4th. The Court below erred in refusing to give to the jury the instruction asked for by the plaintiff in error, defendant below, as follows (fol. 105):

"The Court further instructs the jury that the National Bank act does not make it a condition precedent to election as a Director that he shall own ten shares of stock, but that the provisions in said act are complied with if, within a reasonable time after his election, he thus qualifies himself by the purchase of the requisite number of shares provided by law as a qualification of a Director."

5th. The Court below erred in refusing to give to the jury the instruction asked for by defendant below, as follows (fol. 106):

"That the mere fact of election of the defendant to the office of Director is not sufficient to charge him as a stockholder, provided, within a reasonable time, he purchases or acquires the requisite number of shares provided by law as a qualification of a Director of a bank; that the fact that the defendant was elected and acted as a Director will only imply on his part an agreement to qualify himself by the acquisition of the requisite number of shares within a reasonable time after his election."

6th. The Court below erred in refusing to give to the jury the instruction asked for by defendant below, as follows (fol. 107):

"The Court further instructs the jury that if they find from the evidence that on November 21, 1883, the defendant was elected Director of the First National Bank of Leadville, and accepted such office, and if at that time he was negotiating for the purchase of twenty shares of stock from one P. J. Sours, and that he did, within a reasonable time thereafter, purchase said shares of stock, that the defendant qualified himself as a Director without reference to the fifty shares of stock that had been before that time and on the 29th day of October, 1883, transferred to him on the books of the company."

7th. The Court below erred in refusing to give to the jury the instruction asked for by defendant below, as follows (fol. 109):

"The Court further instructs the jury that if they find from the evidence that on the 29th day of October, 1883, F. W. DeWalt, the then President of the First National Bank of Leadville, transferred or caused to be transferred upon the books of the bank fifty shares of stock to the defendant without the defendant's knowledge or consent, and without any consideration having been paid therefor, and if they further find that the defendant, as soon as his attention was called to said transfer, and as soon as he had knowledge of that fact, instantly repudiated the transaction and refused to be bound by said transfer and refused to accept the stock so transferred to him, then he is not the owner of the said fifty shares of stock and not liable for any assessment thereon."

8th. The Court below erred in refusing to give to the jury the following instruction, asked for by defendant below, to wit (fol. 110):

"The Court further instructs the jury that if the fifty shares of stock mentioned in the complaint were transferred to the defendant on October 29, 1883, without the knowledge or consent of the defendant, and that, as soon as that fact came to the knowledge of the defendant, he repudiated the transfer and refused to accept the stock so transferred, and immediately paid back the dividend which was passed to his account upon the books of the bank to the transferror, then he is not liable for the said sum of $1,250, which represents the dividend declared on January 2, 1884, upon said fifty shares of stock."

9th. The Court below erred in refusing to give to the jury the following instruction, asked for by the defendant below, as follows, to wit (fol. 112):

"The Court further instructs the jury that the burden of proof is upon the plaintiff to establish, by a fair preponderance of testimony, that the transfer of the fifty shares of stock to the defendant on October 29, 1883, was made with the knowledge and consent of the defendant, or that after such transfer the defendant, with full knowledge of all the facts, accepted and ratified the same, and that this rule also applies to the $1,250 of dividend upon said stock, for the recovery of which this action is in part brought."

10th. The Court below erred in refusing to grant the motion of defendant below for new trial, and in giving judgment upon the verdict.

Wherefore, the plaintiff in error says that the judgment in said cause should be reversed, remanded, and wholly for naught held.

BRIEF AND ARGUMENT.

The first assignment of error is based upon the refusal of the Court to permit the said cause to go to the jury, and instructing them to find a verdict against the plaintiff in error, and that the plaintiff in error was estopped from denying the ownership of the fifty shares of stock standing in his name upon the books of the bank. The evidence which was given at the trial in the Court below goes to show that there was no regular stock register kept in the bank, and that the only memoranda of transfers of stock were those which were shown by the stubs in the book of stock certificates. These stubs showed a transfer of fifty shares of stock to the plaintiff in error. The plaintiff in error denied any knowledge of such transfers to him—that he ever held or saw certificates for such shares or any of them, or that he had given any consideration therefor, saying that his first knowledge of any such transfer was occasioned by the placing of the $1,750 to his credit at the bank as dividends, and which dividend was declared without his knowledge or participation; that immediately upon his being notified of such credit and the information that it had been placed there by the order of Frank W.

DeWalt, President of the bank, he went to DeWalt and asked for an explanation, whereupon DeWalt told him that he had himself occasioned the transfer. Plaintiff in error testifies that he immediately repudiated the transfer, gave DeWalt a check for the dividend and instructed him to re-transfer the stock to himself.

Various phases of the rights growing out of stock transfers and of the liability of stockholders has been very thoroughly discussed by the text writers, both of England and of the United States, and have been frequently considered by this Court. The transfer of stock of corporate companies is subject to all of the general rules regulating the transfer of personal property, together with many statutory restrictions regulating the same. Stock is personal property, the title to which cannot be acquired without consent. Where the transfer of any personal property will inure to the benefit of the grantee, his assent will be presumed, although he may be, in fact, ignorant of the transaction. This rule applies, however, only when the transfer must be beneficial to the grantee.

Shares of stock in a corporation subject their owners to individual liability. The ownership of it is not, therefore, necessarily beneficial, but may impose liabilities which are greater than the advantages arising from its possession, and hence, in the transfer of corporate stock, which necessarily carries with it all the responsibilities attaching to the ownership, there is no presumption of acceptance. It is especially clear that, where an attempt is actually made to enforce the liability of the transferee, no presumption will prevent his right to refuse the transfer.

Lowell's Transfers of Stock, 32.
Cartmell's case, 9 C. D., 691.
Robinson vs. Lane, 19 Ga., 337.
Skowhegan Bank vs. Cutler, 49 Me., 315.

In all cases, however, in which the transfer of stock has originally been made without the knowledge and consent of the transferee, he has the right to repudiate the transaction, providing he has not already confirmed it.

Ex parte Hennessey, 2 Mc. & G., 201.

It must be admitted, certainly, that a person is presumed to be the owner of stock when his name appears upon the books of the company as such owner; and, in such cases, it is well established that the burden of proof is upon him to show that he is, in fact, not the owner, in all cases when he shall have been sued as such owner to enforce his liability. But the mere fact that his name does appear upon the books of the company as such owner shall in no way operate to estop him from a denial of ownership, but he shall still have the opportunity of being heard to deny such presumption of ownership and of maintaining the burden of proof which is cast upon him. This Court has clearly and unmistakably recognized and decided that such right exists in the 91st U. S. (1 Otto), in the case of Webster vs. Upton, Assignee, pages 65-72.

The same principle was reaffirmed in the case of Turnbull vs. Payson, reported in the 95th U. S., pages 418-421.

In the opinion, Mr. Justice Clifford said:

"Where the name of an individual appears on the stock book of a corporation as a stockholder, the *prima facie* presumption is that he is the owner of the stock in a case where there is nothing to rebut that presumption; and in an action against him as a stockholder, the burden of proof that he is not a stockholder or the rebutting of that presumption is cast upon the defendant."

This principle is sustained by a number of authorities which have been cited in connection with the above in the opinion of the Court.

In the case at bar, the plaintiff in error gave evidence on the trial to the effect that he had never purchased the shares of stock which appeared in his name on the books of the company, and, further, that he had refused to accept dividends which had been placed to his credit at the bank on behalf of the said fifty shares of stock. This testimony was uncontradicted.

In Turnbull vs. Payson, it appeared by satisfactory proof that the defendant had received dividends upon the shares of stock which stood upon the books of the company in his name, and the ownership of which he had attempted to disprove. The Court, therefore, held that such fact, together with the other evidence of a documentary character which was offered, was sufficient to bind and hold him to all his responsibilities as an owner. The status of the present case, however, is entirely the reverse of that in Turnbull vs. Payson, in this, that the plaintiff in error was not only entirely ignorant of the transfer of stock to him, and of its registry on one of the books, and never saw the certificate thereof, but he absolutely refused to accept the dividends which were placed to his credit on behalf of said fifty shares of stock, and returned them the same day on which he learned of their transfer to his credit, to the person whom he understood owned and attempted to transfer the stock to him. Both of the above propositions —that is to say, the general one that the mere transfer of stock on the books of the bank to the name of any person would not prevent his being heard afterwards to deny his acquiescence in the same, and also that which relates to the effect of the receipt of dividends upon the stock, or the doing of some other overt act, which might afterwards amount to an acceptance—have recently been discussed by this Court in the case of—

Keyser vs. Hitz, 133 U. S., 138.

The defendant in that case was a married woman, and, among other things she pleaded, as a defense to the action of the Receiver of the German National Bank of the city of Washington against her as a stockholder to enforce an assessment, that if she was a stockholder upon the books of the bank, and stock had been, in fact, so transferred to her, it was done entirely without her knowledge, and that she had never been the owner of any stock and could not, therefore, be subject to any assessment thereupon. The opinion of the Court, delivered by Mr. Justice Harlan, is a very lucid and thorough discussion of the principles of law which measure and determine the responsibilities of any stockholder of a corporation who attempts to avail himself of this defense. There was evidence given in that case showing that the dividends upon the stock had been paid to her by checks payable to her order and which she afterwards indorsed, as was claimed, to the owner of the shares. There was also other evidence, and, in fact, the jury found in the Court below that she was ignorant of the transfer of the stock in the bank to her name at the time it was made.

The opinion of the Court is, in substance, this:

That even if she was ignorant of and took no part in the original transfer of the stock to her, yet, if when she afterwards became aware of the transfer and therefrom received dividends, she became a shareholder for all purposes of individual liability in respect to the contracts and debts of the bank as fully as though she had actively participated in the original transfer and the same had been made with her full knowledge and consent.

The Court say:

"We must not be understood as saying that the mere transfer of the stocks on the books of the bank imposes upon her the individual liability attached by law to the position of a shareholder in a National Bank Association. If the transfers were, in fact, without her knowledge and consent, and she was not informed of what was so done, nothing more appearing, she would not be held to have assumed or incurred liability for the debts contracted, or engagements of the bank, but if, after the transfers, * * * * * or in any other mode approved, ratified or acquiesced in such transfers, or accepted any of the benefits arising from the ownership of the stock thus put in her name on the books of the bank, she was liable to be treated as a shareholder, with such responsibility as the law imposes upon the shareholders of a National Bank."

That is to say, that the transfer of stock to a person upon the books of a company is not sufficient in itself to make him an owner of the same and subject to the liabilities thereof, unless he shall have done something which shall constitute an acceptance of the transfer, or which estops him to deny his ownership.

Tripp vs. Appleman, 35 Fed. Rep., 19.
Turnbull vs. Payson, *Supra.*

What will amount to an acceptance in the transfer of stock is a question of fact not as yet regulated by any general rules of law.

Lowell on Transfer of Stock, 34.
Pim's Case, 3 DeG. & S., 11.
Sanger vs. Upton, 91 U. S., 56.

In the transfer of personal property—and corporate stock is personal property and subject to all the general rules of law regulating it—it may be safely said: There is no acceptance unless the transferee has exercised his option to receive or reject the property transferred, or has done something which will operate to deprive him of his option.

Benjamin on Sales, 154.
Gillman vs. Hill, 36 N. H., 311, 320.
Sheppard vs. Pressy, 32 N. H., 55.
Messer vs. Woodman, 22 N. H., 181.
Bell vs. Merritt, 9 Gill, 331.
Gorham vs. Fisher, 30 Furman, 428.
Clark vs. Tucker, 2 Sanford, 157.

There can, of course, be no acceptance of a transfer until knowledge of it comes to the transferee. Until made aware of it, he can be guilty of no act or omission which will serve either to repudiate or affirm the transfer. What he does or omits to do after being informed of the transfer must determine his rights and liabilities with reference to it. To hold, as was held by the trial Court, that the transferee must be presumed—he being a Director of the bank—to have had knowledge of the transfer because it appeared on some one of the bank's books, whether the right one or not, and that such presumption is conclusive, and then to follow such reasoning by denying to the transferee the right to show that he had repudiated the transfer, is to arbitrarily set at naught both reason and precedent, and to impose upon an ignorant transferee, who happens also to be a Director, consequences which the law never contemplated or designed.

In the light of the foregoing authorities, it is very clear that the plaintiff in error should have been allowed to go to the jury with the defense which he had made. That defense involved questions of fact, of the truth of which it was the sole judge.

> Commissioners vs. Clark, 94 U. S., 278–284.
>
> Pawling vs. U. S., 4 Cranch (U. S.), 219–222.
>
> C., R. I. and P. Ry. Co. vs. Lewis, 109 Ill., 120–124.
>
> Lord vs. Pueblo S. and R. Co., 12 Colo., 390.

He denied that he knew of the transfer of the stock to him until the dividend had been placed to his credit in the bank; that he thereupon and immediately instituted inquiry and learned that the stock had been transferred to him by DeWalt, the President of the bank, on one of the books, some time before; that he immediately drew his check for the $1,250, payable to the order of Frank W. DeWalt, whom he believed to be the transferror and the real owner. This, together with all of the evidence which was given in the case, should have gone to the jury under the proper instruction, limiting and defining the liability of stockholders and the law affecting the acceptance of transferred stock in order that the same, which we see by the authorities is a question of fact, might have been passed upon by the jury. Instead of that, the case was taken from the jury, or, rather, the jury were instructed that the plaintiff in error was estopped from denying his ownership, inasmuch as the same appeared in his name upon the books of the bank, and they were accordingly instructed to bring in a verdict against the plaintiff in error for the par value of the fifty shares of stock, together with the dividend which he had long before paid over.

This was manifest error and at variance with every decision which has been made by Courts of last resort both in England and America, upon the rights and liabilities of stockholders.

It will appear from the evidence, in case it should be urged, that the plaintiff in error was guilty of negligence or laches in not seeing that the re-transfer had been completed upon the books of the company after he had repudiated the stock; that in the first place, no regular register of stock was kept in the bank, and he never had the certificate in his possession. Second, he was immediately drawn upon a panel of jurors in the District Court of the county where he lived, and sworn as a juror, in a case both tedious and lengthy, and was confined as such until late at night upon the 21st day of January (the same being Saturday), A. D. 1884; that, the next day being Sunday, the defendant, in the short space of time elapsing before the closing of the doors of the bank and in the absorbing interest and attention which the affairs of the bank demanded, had no opportunity to inquire as to the re-transfer of the shares; that on the next day the bank went into liquidation and passed into the hands of a Receiver, since which time plaintiff in error has had no access to the books of the bank. But if he had done otherwise, it would now operate to his disadvantage. Let us suppose that Finn, immediately upon his release from the jury room on the eve of the failure of the bank, had, in fact, gone to DeWalt and insisted upon and compelled a re-transfer of the stock back to DeWalt. It would now be urged against him, as unmistakeable evidence of his intent to escape his liability. The fact that, at a time when he knew the failure of the bank was inevitable, he had compelled DeWalt to re-transfer the shares, would be urged as a badge of fraud so overwhelming and conclusive that no evidence could explain it away.

After plaintiff in error had repudiated the transfer of stock to him by DeWalt in express terms, and at once refused to accept the dividend upon the same, which had already been placed to his credit, and had paid the same to DeWalt, the proper owner of the shares, he had done everything that it was necessary for him to do to demonstrate that he had not accepted and did not intend to accept the transfer of stock made to him by DeWalt. Even if he had not done this at that time, in the light of all the authorities, and more especially by the decisions of this Court, he would have the right, when sued upon his liability as a stockholder, to show that when he became aware of the transfer to him, and since that time, he had never done anything which amounted to an acceptance of the stock in question; and all the more forcibly the rule will apply where the transferee, being made aware of the transfer, so far from accepting of the same, either covertly or otherwise, openly and avowedly renounced and repudiated the transfer.

It will be seen in the present case, from the evidence, that no demand was made upon either DeWalt or McNany at any time for the assessment upon the fifty shares of stock which, it is claimed, were transferred by them to plaintiff in error. The rule clearly is that where transfers of stock are made by stockholders which are not *bona fide*, either because of the inability of the transferee or because the transferror made the same with the intention of avoiding his liability as a stockholder, or where the transfer, in fact, has never been made or consummated with the transferee, the transferror is liable to the same extent upon the stock as though the transfer or attempted transfer had never been made.

P. J. Sours, the former cashier, testified that he was instructed by DeWalt to make out a certificate of these fifty shares to the plaintiff in error, Finn, and that he did, in fact, do so, but never delivered the said certificate to the plaintiff. Plaintiff himself denied that he had ever received a certificate for the fifty shares of stock from any one. If this were true, it was a matter of consideration for the jury; or if the certificate of stock had never been delivered to the plaintiff in error, then there could have been no transfer of the stock, and DeWalt, or whoever the transferror was, would have been liable upon these shares.

The circumstances attending all of these transactions, it is fair to presume, would have had great weight with the jury in determining whether or not there had been any *bona fide* transfer of the stock to Finn and acceptance by him of the same, or whether it was all a scheme to shift the responsibility which might arise from the threatened collapse of the bank.

The second assignment is based upon the error of the Circuit Court in instructing the jury that under the evidence of the defendant, as well as the testimony of the defense, the defendant was estopped from denying the ownership of the stock in controversy (which has been discussed), and that, inasmuch as he had repaid the $1,250 in dividends, not to the bank, but to Frank W. DeWalt, he did not refund the amount thereof in the manner which he should have done—in other words, that he should have paid the $1,250 to the bank, instead of to Frank W. DeWalt.

It will take but a word to show the fallacy of this position:

A dividend at twenty-five per cent had been declared by the Trustees of the bank. This dividend, of course, was payable to the stockholders of the bank and not to the bank itself. As soon as the dividends were declared, they became the individual property of the stockholders in proportion to the amount of stock which they might hold.

Immediately upon the declaration of a dividend by the Directors of a company, it becomes a debt due and payable from the company to the stockholders.

Morse on Banks and Banking, 134.
Angel & Ames on Corporations, 557, note.
King vs. Paterson R. Co., 5 Dutch., 82, 504.
March vs. Eastern R., 43 N. H., 515.
Foote, Appellant, 22 Pick., 299.
Fawcett vs. Laurie, 1 Drew & S., 192.

The $1,250 in question was a twenty-five per cent dividend upon the fifty shares of stock here involved. This dividend, as soon as it was declared, became the property of the owner of that stock at the time of declaring the dividend. And as shown by the above cited cases, the dividend belongs to the holder of the stock at that exact time when the same is declared, absolutely and without regard to the time of its accretion, nor can it be apportioned or divided among several persons owning the stock respectively, during the time of the accumulation of the profits or dividends.

Finn, upon inquiry, had learned that DeWalt had transferred the stock to him. He repudiated the transfer, saying to DeWalt that he must take back the stock—that he, Finn, did not want the same, and at the same time he, of course, repudiated the dividend which had been placed to his credit, and drew his check in favor of the person who claimed to be the owner, and who was, in fact, in possession of the fifty shares of stock.

The Court below instructed the jury that this should have been paid to the bank, and that when Finn failed to repay it to the bank he did not return it in the proper manner. Certainly the bank was not the owner of this stock, nor could it be the owner of its own stock under the National Banking Law, save as security for pre-existing debt. If it was not the owner of the stock, it had no more right to the dividend than any stranger. The $1,250 was the profit attached to the said fifty shares of stock, and must necessarily follow the said shares of stock, wherever they might be, and inure to the benefit of the holder of said fifty shares of stock, whoever he might be.

There is no question here raised, or, indeed, could there be any, as to the existence of this fifty shares of stock. If they were spurious or fraudulent, and, in fact, did not exist, the instruction below might have had some show of logic. As far as this controversy goes, these fifty shares of stock were either the property of the transferror, DeWalt, or the transferee, Finn. Finn denied the ownership, repudiated the transfer from DeWalt to himself, and at the same time paid to DeWalt what he (Finn) knew necessarily belonged to the ownership of the stock itself, to wit, the dividends which had been declared thereon. The dividend of $1,250 was paid by the bank to Finn through an error which Finn acknowledged and was cognizant of— money which properly belonged to the transferror, DeWalt. Finn transferred the money to DeWalt, becoming thereby simply a trustee as to those funds for the use and benefit of DeWalt. He paid them to DeWalt, to whom they certainly would have gone as the holder of the fifty shares, and in that way he perfected and performed the conditions of his trust. If he had returned them to the bank, the only action possible to the bank would have been to pay the money to DeWalt. Finn did this as effectually as the bank could have done it.

Assuming, for the benefit of the argument, that the dividend in question was fraudulently declared, still Finn ought not to be held liable for the $1,250 because he failed to return the same to the bank. It was improperly placed to his credit, and he at once gave it to the man who owned the stock to which it belonged, leaving other matters to be determined from that status. Finn thought at that time that the dividend was properly declared. No effort was made to recover this dividend from DeWalt, and because Finn temporarily and unwittingly held it in its passage from the bank to DeWalt is not sufficient to make him liable. A Director actively participating in the fraudulent declaration of a dividend renders himself liable to the corporation for the loss thus occasioned. He must be an active participant in the fraud or in collusion therewith, however, to render him liable.

Where, however, a dividend is once declared, unless through mistake (Ins. Co. vs. Page, 17 B. Mon., 412, 442), it becomes absolute and at once exists as a debt due to the stockholders, even though declared by fraud. After this stage, equity will not interfere to enjoin the disbursement. The stockholders can at once collect the same from the bank or corporation, which, in turn, can maintain its action against those Directors privy to the fraud.

Morse on Banks and Banking, 133–134.
Ball on National Banks, page 55, *et seq*.
Angel & Ames on Corporations, 557 and note.
Conant vs. Seneca Bank, 1 Ohio St., 298.
Gunkle's Appeal, 48 Pa. St., 13.
Fawcett vs. Laurie, 1 Drew & S., 192.

DeWalt, the owner of the fifty shares of stock, received the $1,256 dividend on the same, which the bank paid out for that purpose, and it makes no difference in what manner he received it or through what circuitous channels it may have gone, so long as it reached its proper destination, the holder and owner of the fifty shares of stock. Even if it were not so, it would have never been anything more than a question between DeWalt and the bank on one hand and DeWalt and Finn on the other, but, having gone to the proper person, it is idle now to discuss how it got there or what might have happened under other circumstances. DeWalt accepted it and converted it to his own use so far as anything is shown to the contrary in this Record, and that the $1,250 was charged to and deducted from the account of Finn at the bank is substantiated by the account books of the bank and by the check itself..

The Record of the case shows that the entry in the books of this dividend of twenty-five per cent which purported to have been declared by the Directors of the bank was in a feminine handwriting. Defendant in error and also Mr. Mater, another Director of the bank, recognized the writing as that of a niece or cousin of the President, DeWalt.

The account of the Directors' meeting showed both the defendant in error, Finn, and also the said Director, Mater, were present at the Directors meeting in which this dividend was declared, and actively participated in the passing of the resolution. Both of these Directors on the trial of the case below testified that the entry in the proceedings showing them to be present was false—that neither of them had been present at any meeting of the Directors where a resolution had been offered or passed in its effect declaring a dividend, and, furthermore, that they did not know that a dividend of that character had been declared until they had been so notified by DeWalt and found that the same had been credited to their respective accounts at the bank. There is no question that this dividend was a fraudulent one and was entirely unwarranted by the actual condition of the bank, but also that it was declared by DeWalt himself for the purpose of showing a fictitious prosperity and of hiding from the public and from the Directors a knowledge of the real condition of the bank's affairs.

Defendant in error never had any experience in the banking business. He had been originally a sea captain, had gone to Leadville about 1879, and became interested in the business of smelting ores. He had never had any connection with any banking business or insight therein until he had consented, upon the representations of DeWalt that it was in a highly prosperous condition, to accept the position of Vice-President in the First National Bank of Leadville. It was a very simple matter for DeWalt, who was the largest stockholder of the bank—in fact, we may say the bank itself—to deceive one who was as ignorant of banking matters as the defendant in error was of the real condition of affairs. When DeWalt had urged the defendant in error to purchase some of the stock of the institution and become a Director therein, he assured him that the bank was in a very prosperous condition, by reason whereof it would be a good investment for him to make. Defendant in error in November acceded to the solicitations of the said DeWalt and agreed to purchase some of the stock in the bank as soon as he should be able to get some at a reasonable figure. He did afterwards, in fact, purchase the stock of P. J. Sours, the same being twenty shares at the rate of $120 per share, paying thereon a premium of $20. The said Sours had been theretofore the Cashier of the institution, but his resignation was accepted by the Board of Directors at their meeting held on the 21st day of November, 1883, upon which date the defendant was elected a member of said Board. Thereafter and on or about the 12th day of December, A. D. 1883, the sale was consummated by the payment to Sours of the sum of $2,400, which he bought as an investment and for the purpose of qualifying himself as a Director in the institution, that being the first opportunity which he had had to buy stock at a reasonable figure since his election. Some time previous to this transaction, however, the fifty shares of stock in controversy had been transferred on the book of stock certificates to the defendant in error by Cashier Sours at the instruction and order of the President, DeWalt, for which reason it was urged at the trial in the Court below, and accepted by the presiding Judge as the law, that the fifty shares of stock having been transferred upon the stock books as above described, and standing in the name of the defendant in error upon the stubs at the time of his election, he would be estopped from denying their ownership and would be conclusively presumed to be the owner of the same because he had accepted the office of Director, which brings us to the third, fourth, fifth and sixth assignments of error. These assignments are based upon the refusal of the Court below to instruct the jury, in effect, that where it is necessary to hold a certain number of shares in a National Bank in order to be qualified to act as a Director, the mere fact that a person accepts the office does not make him a stockholder in the number of shares which are necessary to qualify him as such Director; that it simply implies an agreement that he will, within a reasonable time, qualify himself as such, and that it is not necessary that he should be the owner of ten shares at the time of his election, provided he qualifies himself within a reasonable time, and, furthermore, that after the defendant in error actually purchased twenty shares of stock for the purpose of qualifying himself as such Director under the United States statute requiring only ten shares, he was qualified without regard to the fifty shares of stock, which latter proposition is self-evident. As regards the presumptions arising under the two former propositions, Mr. Morse, in his work on "Banks and Banking," discusses the question with a clearness and certainty that cannot be excelled. In speaking of this pre-requisite of the statute to qualification as a Director, he says: "This regulation, however, simply prescribes the requisite qualification for his election to the office. If a person not thus qualified is elected and seeks to enter upon the office without qualifying by the purchase of the requisite number of shares, he may be ousted by legal process, but his acting as a Director will not make him in any manner liable for this number of shares. Neither can he be regarded either at law or in equity, or for any purpose, as the constructive owner of them. His entering upon the enjoyment of the office does not in any case estop him from alleging his non-ownership of the requisite number of shares to qualify him for the position."

Morse on Banks and Banking, page 117.

By how much the stronger is the rule to be applied when the Director shall have qualified himself, in fact, by the purchase of twenty shares in addition to those upon which this constructive liability is sought to be enforced.

The same rule has been laid down with the same certainty in England in

Ex parte Marquis of Abercorn, 31 L. J. Ch., 828.

Ex parte Roney, 33 Id., 731.

These two cases, together with the other English cases following, hold that in England a person who had subscribed for twenty-five shares, was chosen as Director and acted as such, although the ownership of fifty shares was required by law as a pre-requisite qualification to the position, yet he could be held liable as a contributor only for the price of the twenty-five shares, notwithstanding that the company was insolvent and the creditors were suffering.

In the language of Mr. Morse, "A stronger or more conclusive case than this one could not be desired."

In the opinion of the Court as laid down in Barber's case, 22 English Reports, 577, the Court says:

"As I understand the authorities, if it is a condition precedent to the election of a man as a Director that he shall hold a certain number of shares as a qualification, or shall have held them for a given time, and he is elected without a qualification, and never agreed otherwise to take shares, he is not a shareholder or contributor. That is considered by me to be settled by authority."

See also Lord Claud Hamilton's case, 8 Ch. Appeal Cases, 548.

And in Brown's case, 9 Ch. Appeal Cases, 109, the same line of reasoning as the above, it was held that "in order to constitute any person a shareholder there must be proof of an agreement between him and the company that he should become a shareholder. He may acquire shares from other parties, which will qualify him to act as Director. In any event, he cannot become a shareholder contrary to his own intention."

In the case of the Marquis of Abercorn, cited above, Abercorn had consented to become a Director of the bank and was, in fact, appointed a Director, and in about fourteen months thereafter he resigned his office. By the terms of the deed of settlement, no one could be a Director who did not hold £100 capital stock. Abercorn, however, never agreed to be a holder of any stock in the company. Upon the final hearing of the cause, it was held that he could not be placed on the list of contributors on the ground of his having, by accepting the office of Director, come under an obligation to take the stock requisite to qualify him for this office.

Roney's and Stock's cases, 4 DeGex. Jones & Smith, 426.

There can be no question, from the foregoing authorities, that the mere acceptance of the office of Director will not constitute one, so accepting, a shareholder in the company in the absence of an express agreement between him and the company that he will, in fact, become so, and it is no less true that the only obligation imposed upon the one so accepting is that he shall, within a reasonable time, in case he accepts and enters upon the duties of his office, qualify himself as a Director by the purchase of the requisite number of shares. He may purchase these either from the company or from any third party.

Thompson on Liability of Stockholders, Sec. 137.

Tothill's case, 1st Ch. Appeal Cases, 85.

One who has been elected a Director is entitled to a reasonable time in which to qualify by the purchase of shares.

Forbes' case, 8 Ch. Appeal Cases, 774.

From the foregoing authorities, it appears that inasmuch as the National Bank act does not make it a condition precedent to election as a Director that he shall own ten shares of stock, he has reasonable time after election in which to procure the stock, and he may, if he so desire, procure it from other parties than the company. The mere fact of the election and acceptance of the office of Director is not sufficient to charge him. The only implication to be drawn from the mere acceptance of the office is that he will qualify himself within a reasonable time. If, however, he should act as Director for a length of time without purchasing stock, and he should act in such a way as that it would operate as a fraud to permit him to deny it, then by all of the cases he would be held liable only for the minimum number of shares necessary to qualify him for a Director. Under the law as it undoubtedly is, and under the condition of affairs as shown by the evidence herein, the case should have gone to the jury and the instructions prayed for as set out in assignments 3, 4, 5 and 6 should have been given therewith in order that the defendant might have received the benefit of their verdict in the determining of the questions of fact. The refusal to allow the case to go to the jury and to give the instructions prayed for were errors on the part of the Circuit Court which operated to the serious injury of the plaintiff in error. The four remaining assignments of error are based upon the refusal of the Court below to give the three instructions which went to the general merits of the case and upon the refusal of the Court to grant the motion for a new trial.

These grounds have been disposed of by the arguments already advanced in this brief, and do not need to receive further attention at this time; but, in conclusion, we would say that this whole defense should have been passed upon and determined by the verdict of the jury in the trial below.

That there are no rules of law which will estop a stock owner from denying his liability as such upon the transfer of stocks or of denying his ownership or acceptance of the same.

That what is necessary to constitute an acceptance is a question of fact which differs in nearly every case, and rightfully belongs to the consideration of the jury.

For which reasons, we submit that the judgment which has been rendered in said cause should be reversed and set aside.

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IN

The Supreme Court

OF

The United States.

NICHOLAS FINN,
Plaintiff in Error,
VS.
J. SAM BROWN, RECEIVER,
Defendant in Error.

In error to the Circuit Court for the District of Colorado.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

The facts in this case and the law applicable to it are considered at some length in the opinion of Judge Hallett, before whom the case was heard below, in his decision denying the motion of the defendant below for a new trial. This opinion may be found in Volume 34 of the Federal Reporter, on page 124.

It may be called to the attention of the Court that in Hallmark's case, 9th Chancery Division, page 329, the Master of the Rolls commented upon

Brown's case, 19th Beavan, 97, cited by Judge Hallett, limiting somewhat the force and effect of that decision. The Master of the Rolls did say that it would be extending the doctrine of constructive notice far beyond the doctrine in Brown's case to impute to the director, Hallmark, a knowledge of the contents of the stock register, sought to be imputed to him in that case; but that case differed very widely from the case now at bar. There was no requirement in the case of the corporation of which Hallmark was a director, that the directors should be bound to take any number of shares, a point in which the Master of the Rolls says that that case is exceptional, and asks why it should have been the duty of Hallmark, under the circumstances, to look into the list of shareholders. The case now at bar differs very widely from Hallmark's case. It is not only required by statute, Revised Statutes, Section 5146, that every director must own at least ten shares of the capital stock of the association, and that any director who ceases to be the owner of ten shares shall thereby vacate his place, but it is further required, in Section 5147, that each director, when appointed or elected, shall take an oath that he is the owner, in good faith, of the number of shares of stock required, subscribed by him or standing in his name on the books of the association.

It was, therefore, in this case, clearly the duty of Finn, as a director, to make the oath, and to satisfy himself, before making it, that he could make it truly, but he cannot be heard to deny, nor does he deny, that he made the oath; and, having made it, he cannot allege that it was not true. An examination of the books which he made, or ought to have made, would show that on the 29th day of October, 1883, the day before his election as director, fifty shares of stock were transferred to him, and the stock book would have shown that these fifty shares were in one certificate, so that he could not have found that he held the number of shares required by law, without finding at the same time, and by the same record, that he stood upon the books of the association as the owner of fifty shares. (See fols. 25 and 26 of Transcript.)

It appears further that Finn was not only a director, but that on the 21st of November, at a meeting of the Board of Directors, at which he was present and voted, the resignation of the former Cashier was accepted, and Finn, as Vice-President, was authorized to act as Cashier until a new Cashier should be regularly elected, and that he immediately assumed the duties of Cashier (fols. 26 and 36). Among those duties was the duty of keeping the record of stockholders (Section 5210 of the Revised Statutes; and see, also, evidence of P. J. Sours, fol. 31 of Record). So that there was additional reason in this case for holding that Finn, not merely as director, bound to own shares, but as Vice-President and Acting Cashier, was bound to know the contents of the books showing the list of stockholders, at least in so far as the same applied to his own holdings.

It is admitted by the plaintiff in error, in his brief, that a person is presumed to be the owner of stock when his name appears upon the books of the company as such owner, and that it is well established that in such cases the burden of proof is upon him to show that he is, in fact, not the owner, when he has been sued as such owner to enforce his liability; and the rule is sought to be applied to directors as well as to stockholders; but there is a clear distinction to be drawn in this that a stockholder is not ordinarily presumed to know the affairs of the corporation except in a general way, and cannot be conclusively presumed to know that his name appears as the name of a stockholder upon the books of the company.

The case is entirely different with a director, especially a director who is bound by law to be a stockholder during all the time that he holds office, and more especially a director who is also a Vice-President and Acting Cashier.

It is claimed by the plaintiff in error, in his brief, that, in cases where directors are required to be stockholders, it is not necessary that they should actually hold stock at the time of election as directors, but that it is sufficient for them to acquire the requisite number of shares of stock within a reasonable time after election, and some English cases are cited, in which it is claimed that that doctrine is laid down (see page 29 of plaintiff's brief).

He cites, also, the passage from Morse on Banks and Banking, which is based upon and applicable to the English cases cited by the appellant. It will be seen, however, from an examination of these authorities, and of the general trend of the decisions in England, upon this question, that the rule there laid down is very much restricted. In the case of the Marquis of Abercorn, cited by plaintiff in error, there was no statute compelling a director to hold stock. There was merely a by-law requiring it, and the true import of that decision is explained by Lord Selborne in Brown's case, 9 Chancery Appeals, 102, on page 105, in which he states that the question in the case there raised is whether, from the acceptance of the office of director, and the consequent authorized representation to the world, that the person so accepting was a director, such representation being continued over a period of time—whether, from that alone, *a contract with the company to take shares could be inferred.*

Roney's case, otherwise known as Stock's case, cited by the plaintiff in error, was another case in which there was merely a by-law requiring a director to hold stock, and, as Lord Selborne again explains in Forbes' case, 8 Chancery Appeals, 772, on page 775, it was held in that case that the rule did not apply to a director, who was such upon organization, as was the case with the defendant in that case, but that the rule only applied to those who became directors later.

In Barber's case, cited by the plaintiff in error, the defendant never accepted his position as director, and never was properly elected.

In Lord Claude Hamilton's case, the rule requiring directors to be stockholders did not apply except to directors who became such subsequent to the organization.

The plaintiff in error then cites Brown's case, 9 Chancery Appeal Cases, page 109; but a reading of the entire case will show that it is a strong authority against the contention of the plaintiff in error. The real point at issue in the case was whether he was bound to take from the company the shares necessary to qualify him to be a director, or whether it was sufficient if he acquired such shares from other persons, and it was held that it was sufficient if he so acquired such shares, but that they must be acquired in some way. The Lord Chancellor, after citing the Marquis of Abercorn's case, and defining its true import, says, on page 106, "The other authorities are all cases in which, as a matter of fact, shares had been registered in the name of the director—which circumstance occurs in this case also—and, in these other cases, it was, in my opinion, most justly regarded as a very material fact to be considered when a director tried to get rid of the shares actually registered in his name, that he had accepted the office of director, which he ought not to fill without qualification. In such cases, a director must have a qualification, and is bound, as a director, to be acquainted with what is done in the management of the affairs of the company. It was, therefore, a just conclusion of fact that an act done by a person acting under the authority of the directors, the result of which was to place in the name of a director, shares which he ought to have as a qualification, that that act was done by his authority, and that he could not be allowed to repudiate it." So that the English cases clearly hold that, where holding of shares is required of a director, and such shares have been placed in his name, even without his knowledge and consent, and he acts as director, he is not permitted to deny that he was the owner of such shares.

See, also, Miller's case, 3 Ch. D., 661,

The plaintiff in error, after contending for the rule above discussed, says in his brief, on page 29, "By how much the stronger is the rule to be applied where the director shall have qualified himself in fact by the purchase of twenty shares in addition to those upon which this constructive liability is sought to be enforced." The plaintiff in error there refers to the fact that, on the 12th day of December, he became the owner, by purchase from one P. J. Sours, of twenty additional shares of stock; but, even under the English authorities, his position would scarcely be strengthened by this condition of facts. (See Fowler's case, Law Reports, 14 Equity, page 316.)

But even if the rule in England were as contended for by the plaintiff in error, it would not be applicable to the case of national banks, under our statutes, for, as already pointed out, the rule that a director shall be the holder of at least ten shares of stock is not only a strict statutory rule, but each director is required, when appointed or elected, to make oath that he is the owner of such shares. The public have the right to assume that such is the fact, and such an assumption probably enters into the consideration of creditors in giving credit to the association.

The plaintiff in error claims that he was actually ignorant of the fact that the fifty shares in question stood in his name, and that immediately upon discovering it—upon receiving a dividend upon the shares—he repudiated the transaction. Even if he can be allowed to say that he was ignorant of the fact, did he, after discovering the fact, do all that was incumbent upon him to do to remove his name from the list of stockholders as to those shares? It seems he told the President, from whom the shares had come, to retransfer them (fol. 34); but was it not his duty, as Acting Cashier, to make the retransfer himself; or, at least, was it not incumbent upon him, as such Cashier and as a director, to see to it that the shares were so transferred, especially in view of the suspicious circumstances under which the discovery was made?

The evidence shows that *almost* immediately after that time he was drawn upon the jury, and, for a part of the time, kept in confinement, and was not discharged until the day before the collapse of the bank; but it does not appear that he was at all times, while serving upon the jury, kept in confinement, nor is it probable that this was the case, nor does it appear that he was drawn immediately.

In Brown's case, 19 Beavan, page 97, cited by Judge Hallett in his opinion, the syllabus says: "A director of a company is in a very different position from that of an ordinary shareholder, for, having the means of seeing that all the formalities of transfer required by the constitution of the company are complied with, he is bound, in transferring his own shares, to see to the regularity of the transfer. If he neglect to do so, and there be a want of formality therein, he remains contributory."

See Whitney vs. Butler, 118 U. S., 655, 662.
Richmond vs. Irons, 121 U. S., 27, 58.

In the case at bar the plaintiff in error simply directed the President, who had, under suspicious circumstances, caused the stock to be transferred to him, to have the stock retransferred to himself, and nothing further appears to have been done toward having the stock transferred.

Judge Hallett ordered a verdict, not only for the amount of the assessment upon the shares, but for the amount of the dividend wrongfully paid and received by the plaintiff in error, upon the ground that he ought to have restored the amount of the dividend to the bank instead of to the President, as he did do, considering the President to be the real owner of the shares upon which the dividend was paid. This is assigned as an error by the plaintiff in error, and he claims that, immediately upon the declaration of a dividend by the directors of the company, it becomes a debt, due and payable from the company to the stockholders, citing cases in support of that doctrine; and in general it may be admitted that that doctrine is the true one, but it is certainly also true that every shareholder in a national bank who receives dividends wrongfully declared, not out of the profits of the bank, is liable to the bank or its creditors for the amount so withdrawn. Section 5204 of the Revised Statutes.

Mills vs. Mills, 6 Bissell, 98.

And while there might be some excuse for a mere shareholder, who had no knowledge of the condition of the bank, if, upon discovering that a dividend had been paid to him by a mistake, upon stock supposed to be his, but really the property of another, he transferred the amount of the dividend to the real owner of the stock, upon the ground that such stockholder had no knowledge of the true condition of the bank, this excuse cannot be made for a director, particularly a director who was Vice-President and Acting Cashier of the bank. On the contrary, he is bound to know the condition of the bank, as to its solvency or insolvency, and, having that knowledge, may be held responsible if any dividends are wrongfully declared.

Morse on Banks and Banking, 3 Ed., Secs. 128*a* and 137.

Merchants' Bank vs. Rudolph, 5 Neb., 540.

And if, as plaintiff in error contends, the dividend was declared secretly, and without his knowledge, nevertheless, upon his finding that such a dividend had been declared, and a part of it paid to him, the knowledge which he was bound to have of the condition of the bank should have informed him that it was wrongfully declared, and that no act of his ought to have allowed the amount of the dividend to be taken or kept out of the bank. He must have known that such dividends as were paid, even to *bona fide* holders of stock, were wrongfully paid, and that the true holder of the fifty shares, whoever he might be, was not entitled to this dividend; and the fact, if it be a fact, of the secret declaring of the dividend, should, when it came to his knowledge, have made it more incumbent upon him to protect the bank so far as was in his power, and to prevent such amount of money as was involved in that dividend from going to persons who had no right to it, or from being in any way deducted from the resources of the bank. He has, since the institution of the suit, restored to the bank the amount of the dividend paid to him on the twenty shares of stock, which he admits that he owns, thereby admitting that said dividend was wrongfully declared, and it is difficult to see how, in law, the dividend paid to him upon the other fifty shares, and never returned to the bank, stands upon a different footing.

Respectfully submitted,
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CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 106.

NICOLAS FINN, Plaintiff in Error,

vs.

J. SAM. BROWN, Receiver, &c.

STATEMENT OF FACTS.

J. B. Henderson,
For Defendant in Error.

Judd & Detweiler, Printers, Washington, D. C.

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STATEMENT OF FACTS.

The First National Bank of Leadville closed its doors to business on the 22d day of January, 1884. One Ellsworth was appointed receiver, who served for only a short time, when the defendant in error was appointed his successor. On October 30, 1883, the plaintiff in error, Finn, had been elected a director of said bank, and on the same day was elected vice-president thereof. On November 21, 1883, P. J. Sours, the then acting cashier, resigned his place, and his resignation was accepted, Finn being present and voting thereon. At the same meeting Finn, as vice-president, was authorized to act as cashier of the bank until a new cashier should be regularly appointed. At the same meeting Finn and De Walt, president of the bank, were constituted a committee to pass on notes offered for discount. From this period until the failure of the bank Finn acted as cashier, transacting all the business usually pertaining to that position. On the day preceding Finn's election as a director and vice-president of the bank, to wit, on October 29, 1883, there were transferred to Finn fifty shares of the capital stock of the bank, forty shares of which came from one McNany and ten shares from Frank De Walt, president of the bank. No stock book in regular form seems to have been kept in the bank, but there was a book belonging to the bank in which appeared a full list of the stockholders and all transfers of stock. In this book appeared a credit to the defendant of this stock, under date of October 29, 1883. Afterwards, on December 12, 1883, Finn purchased of Sours, the former cashier, twenty shares of stock at a premium of 20 per cent., paying him the cash therefor. This stock also appeared on the stock book, credited to Finn, on the day of its purchase.

On January 2, 1884, a dividend of 25 per cent. on the capital stock of the bank was declared, and the sum of $1,750 was credited to Finn on the books of the bank as his share of said dividend on seventy shares of stock. The record of the meeting of the directors at which the dividend was declared showed that Finn was present and seconded the motion for the declaration of dividend.

The evidence showed, and it was not disputed on the trial, that when this dividend was declared the bank was utterly insolvent.

The books of the bank show that on January 9, 1884, the sum of $1,250 was credited to De Walt and charged to the account of Finn.

Finn in his testimony denies any knowledge of the declaration of dividend on January 2, 1884, until he was told by De Walt on that day that such action had been taken. He also says that the paying teller, on the same day, informed him, to his surprise, that $1,750 had been credited to him on the books for dividends. He says he at once approached De Walt and sought an explanation of this credit; that he had previously had no knowledge of the transfer of the 50 shares of stock to him, and that he at once repudiated the ownership of said 50 shares, and at once drew his check, payable to De Walt, for $1,250, the amount of the dividend; and delivered it to him.

Finn admitted his liability on the $2,000 of stock, and paid the receiver $2,000 after the commencement of this suit, and that he expected or intended to pay the additional $500 which he had received for dividends thereon under the fraudulent declaration of January 2, 1884.

Finn in his testimony states that for four or five years before entering on the business of banking he had been engaged in the smelting of ores at Leadville, and previous to that in the business of transportation on Lake Michigan, with headquarters at Chicago. He admits that from the time of his election as vice-president he had had no other office or place of business than the bank, and was engaged in no other occupation. He professes profound ignorance of the business of banking, and supposed at the time the dividend was declared that the president had the sole right to divide the profits of the bank, and that he gave no further attention to it. He denies knowledge of the insolvency, and did not know that there was less than $100 in the vaults of the bank when it closed.

On September 28, 1885, the Comptroller of the Currency ordered an assessment of 100 per cent. on the shareholders of the association to pay the losses of the bank. Of this assessment Finn had due notice, and a demand was made on him for the par value of the stock, and also for the dividend illegally declared and paid as aforesaid.

On the trial of the case Brown, the receiver, testified substantially to all the facts set forth in this statement, and was corroborated therein by the books and records of the bank.

Ellsworth, the previous receiver, testified that the bank was insolvent on the 2nd day of January, 1884.

Sours, the former cashier, testified that, according to instructions by De Walt, he, on October 29, 1883, issued a certificate of stock for fifty share to Nicolas Finn, forty shares thereof being charged to McNany and ten shares to De Walt; that he had signed the certificate as cashier and left it in the book of certificates; that he had subsequently sold his stock to Finn and received a check from Finn for the amount. This was December 12, 1883.

One Charles Mater, a director of the bank, stated that he was not present at the declaration of dividend, and he thought that the records of the meeting as exhibited to him on the stand were in the handwriting of a niece of De Walt.

Nicolas Finn, the plaintiff in error, was the only other witness, and his testimony, beyond what has been already stated, is material only in denying all knowledge of the transfer of the fifty shares of stock to him on October 29, 1883. No reason is given for the absence as witnesses of McNany and De Walt, from whose stock on the books of the bank were transferred the shares of stock to Finn.

On this state of facts the court instructed the jury to find for the receiver. The record is in the following words, to wit:

> "And thereupon the court instructed, in effect, that under the evidence of the defendant himself, as well as of the testimony of the defense, the defendant was estopped from denying his ownership of the stock in controversy, and, inasmuch as he had repaid the $1,250 in dividends, not to the bank, but to Frank W. De Walt, he had not refunded the amount thereof in the manner which he should have done, and instructed the jury to find a verdict for the amount of the par value of said stock, at one hundred dollars per share, and interest on the par value of said stock, at the rate of ten per cent. per annum, from the date of the demand for payment thereof by the receiver, together with $1,750 dividends; to the giving of which instructions the defendant, by his counsel, then and there excepted."

Several instructions were asked by the defendant, the substance of all of them being predicated on the assumption that Finn's conduct and connection with the bank were not such as to estop him from denying his ownership of the stock.

Argument and brief.

I.

The national banking act, in prescribing the qualifications of directors, provides as follows:

> "Every director must own in his own right at least ten shares of the capital stock of the association of which he is a director. Any director who ceases to be the owner of ten shares of the stock or who becomes in any other manner disqualified shall thereby vacate his place." (See § 5146.)

The next section provides as follows:

> "Each director when appointed or elected shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate or willingly permit to be violated any of the provisions of this title, and that he is the owner in good faith and in his own right of the number of shares of stock required by this title, subscribed by him or standing in his name on the books of the association, and that the same is not hypothecated or in any way pledged as security for any loan or debt."

It is further provided in this section that this oath, signed by the director and certified by the officer, shall be transmitted to the Comptroller of the Currency, and shall be filed and preserved in his office.

First. It clearly appears by the testimony and is admitted by Finn that on October 30, 1883, he was elected a director of the bank, and that he acted as such from that time on. It further appears that he did not become the purchaser of the twenty shares of stock owned by Sours until December 12, 1883. If, therefore, he accepted the place of director on the 30th of October, 1883, and continuously served as such until December 12 following without the ownership of stock, he violated the law, and if he filed the affidavit he was, according to his showing, guilty of perjury. Finn, in his testimony, admits that he had been elected a director and vice-president of the bank on November 21, 1883, and that from the time of his election as vice-president he performed the duties of cashier of said bank. It therefore appears from all the facts in the case that Finn served not only as director, but as vice-president and cashier, long before he became the owner of the Sours stock. It is but charitable, therefore, to presume that the books of the bank speak correctly when they credited fifty shares of stock to Finn on October 29, 1883, the day before his election as a director. It is not unreasonable to suppose that he purchased the fifty shares at par in October, since it is admitted that he purchased the twenty shares of Sours in December following at a premium of 20 per cent.

II.

The records of the bank are substantiated by the testimony that Finn was elected a director and vice-president of the bank at a meeting held October 30, 1883, and that he was authorized to act as cashier at a subsequent meeting, held November 21, 1883. From that time until the failure of the bank, on January 22, 1884, he served as cashier, discharging all the duties of that position.

Section 5210 of the banking act provides as follows:

> "The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall

be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under State authority during business hours of each day in which business may be legally transacted. A copy of such list, on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the Comptroller of the Currency."

It is therefore clearly the duty of the cashier to know at all times the names and residences of shareholders and the number of shares held by each.

III.

The plaintiff in error, by drawing his check for the $1,250 placed to his credit on the books of the bank on account of dividends, ratified the transfer of the fifty shares of stock.

Whatever his purpose at the time, his assumption of control over the dividends constituted him the owner of the stock as to creditors of the bank.

It is worthy of remark that the check, though dated January 2, is not entered on the books till the 9th.

Authorities.

First. The cashier of a bank is its chief executive officer, having full charge of all its personal property, whether specie, notes, bills, bonds, securities, books, and papers of every description. Tellers, book-keepers, and other subordinate officers, however appointed, are under his direction and control. As said by this Court, they are merely "arms by which designated portions of his various functions are discharged."

Merchants' Bank *vs.* State Bank, 10 Wall, 604.
Ball on National Banks, 61.
Bissel *vs.* National Bank, 69 Pa. St., 415.
Morse on Banks, § 157.

Second. It is the duty of the directors of a bank and *a fortiori* of a cashier to know what is shown by the books of the corporation. In the case of a national bank it is especially necessary that the stockholders should be known. It is upon the faith of their double liability that dealers contract with the corporation and depositors trust their money with the bank. The books must always show a legal ownership of every share of stock outstanding. The cashier, whose especial duty it is to keep an account of the stockholders, is estopped from pleading ignorance of these facts.

Curran *vs.* State of Ark., 5 How., 304.
Hawthorn *vs.* Calef, 3 Wall., 10.
Turnbull *vs.* Payson, 95 U. S., 418.
United Society *vs.* Underwood, 9 Bush. (Ky.), 609.
Gunkle's Appeal, 48 Pa. St., 13.

Third. The questions involved in this case were substantially decided by the Supreme Court in Keyser *vs.* Hitz, 133 U. S., 138. In that case when the bank failed Mrs. Hitz denied all knowledge of her ownership of stock in the bank as shown by the books. It appeared, however, that she had endorsed checks drawn payable to her order for dividends due on the stock, upon which the credit was changed from her account to that of her husband. It appeared that originally the stock had been placed on the bank books in her name by her husband. On these facts the Court held that she was liable as a stockholder. The opinion of the Court was delivered by Justice Harlan, and in it the following language is used:

> "If she became aware of the transfers after they were made and thereafter received the dividends, she became a shareholder for all purposes of individual liability in respect to the contracts, debts, and engagements of the bank as fully as if the transfers had been made originally with her knowledge and consent."

Again:

"Whether she received the dividends or not depended upon the inquiry as to whether the checks for them were endorsed by her. If she endorsed them or either of them, she is estopped from saying that she did not know their contents and was not the owner of the shares of stock upon which the dividends were declared."

And further:

"This result is not at all affected by the fact that the proceeds of the checks went to the credit of John Hitz's account as consul-general. If the defendant endorsed the checks in blank or to the order of her husband and delivered them to him, the mode in which he disposed of the proceeds is of no consequence in the present suit."

Again:

"If after the transfers she joined in an application to convert the savings bank into a national bank or in any other mode approved, ratified, or acquiesced in such transfers or accepted any of the benefits arising from the ownership of the stock thus put in her name on the books of the bank, she was liable to be treated as a shareholder," &c.

The principle announced in the Hitz case simply reaffirms the decision of this Court in Sanger *vs.* Upton, 91 U. S., 56 and 64, where it is held that—

"The receipt of a dividend on stock estops a party from denying ownership of it."

Fourth. If in the judgment of this Court it would have been the manifest duty of the trial court to set aside a verdict for the defendant, then the instruction of the lower court was proper.

Chivington *vs.* Colorado S. Co., 9 Col., 597.
Brasher *vs.* D. & R. I. R. Co., 12 Col., 384.
R. R. Co. *vs.* Pickard, 8 Col., 174.
Hobson *vs.* Porter, 2 Col., p. 28.

In the above case of Chivington his unaided testimony was offered to contradict his deed, and the trial court directed a verdict against him; and this ruling was sustained by the Supreme Court.

The Colorado court expressly affirms the doctrine held in 29 Wis., 32, and 54 Wis., 33, and says:

> "The court, looking at the evidence in the most favorable light for the plaintiff in which the jury would be at liberty to view it, must be able to say that there is no evidence which would justify a verdict for him or such a clear and decided preponderance of evidence against him as would require the court to set aside a verdict in his favor."

J. B. HENDERSON,
For Defendant in Error.